recognize that it is very difficult for the Commissioners and the reason we got into it is because some of us in south.... I'm sorry, West Hawaii were very concerned about these particular maps. We didn't feel that they reflected the community of common interest. At least certainly not in West Hawaii and that was our biggest concern, because the computer doesn't know those kinds of things. And I'm not suggesting that I know it, or Chucky knows, knows more than anybody else in this room. But we took a shot at it from the little different perspective as I said. We believe that the district boundaries of these maps needed to be amended because the community interests are not being aligned. We did follow the County Charter for the four mandates that was already explained to you but we also added some working assumptions on our project.

The first one was that we had to keep communities of common interests together and that means a community of common interest to us meant that the people lived in the same geographical area, they have a similar economic base. And I don't mean money, amounts of money, I'm talking whether they are agricultural, rural, whether they're urban or light industrial, or they're resort areas, or whether they are transportation center like an airport.

Um...that they also shouldn't say they share the same town center for their daily stuff. For instance, where their schools are, where the churches are, where the shopping is, um... where their cultural events take place. If that's are the daily stuff that we all go through on a daily basis, you know, where that takes place is...as a common area.

And then we also looked at where the people go when they need to get to a larger area to do, say major shopping. And there's on our Island, of course there are three major areas, Kailua, Hilo and Waimea. And which of those areas were these people more aligned with. So we, that's the attempt

that we made, ah, those were some of the working assumptions, we also did the very best we could to keep subdivisions together and intact. We only one or two subdivisions that we actually had to split and that's because the census tracts were so huge, they had, some of them had ten thousand people, or 7 thousand people, we had to split some of the over to Puna section. Sorry, Julie.

Um...the other thing that we did is, we used a different target number than this Commission did. They used 16 thousand 5 hundred twenty, and that's because they used the U.S. Census Data and they did not have the exclusions at all. And we had some of the exclusions. And I apologize in advance because I'm sure our map is going upset every council member, every boundary changes. We...one of the things that was raised at another meeting was how difficult it is to print ballots when you don't have overlapping House and Senate and County districts. And we took a look at that and we finally threw up our hands and said, there's no way. We're going to have to print multiple ballots if we're going to align ourselves based on the Charter and based on our community of common interests. There's no way that we're gonna make the boundaries of the maps. I am...I have been a precinct worker for the last two years and I can tell you for the...for the issues of who shows up in what precincts to vote, if you're in the wrong precinct, the precinct leader will call your correct precinct, have your name removed from that precinct so you can't vote twice, and you'll vote right where you are. We don't make people run around, so the issue of people going to the wrong precinct is really a non-issue. Its hard on the precinct workers, but we get it done. At least we get it done in West Hawaii.

The other thing is, there will be multiple ballots because people are going to have to vote for one Senate and there's gonna be, possibly in another...in another County district. So let me tell you how we got started on this. I called the County Elections Office and asked them for the information, the Census data and I was refused because this is a licensed piece of software that we're using, and they can't let anyone else use it, they couldn't download any data to me even though it was public data. They could not, even if they wanted to, and so I called the State, I got hold of the State Reapportionment staff, and I Gwabled [sic - groveled] ..and I begged, and I got them to download the U.S. Census Data to me for this Island, and then I got them to download two of the three exclusion groups. There's the non-resident military dependents which we all heard about, we all know of that disaster. That's still is not available because the State Commission has not made the decision to exclude it and so they haven't required their staff to do that job. So we don't have that information. However, we did get the active military, and our Island has only 62 active military personnel. Only 62. And so the number of dependents that they're gonna have with this is gonna be a very low number. It probably won't even make a decimal point change in any district. But it should be there but it isn't. The other thing that I hadn't heard about was non-resident students at the universities. That was part of the exclusion base that was not included in some of these maps. So the total number...the total number that we started with was slightly lower than what the...this Commission worked with. And we had this information down to the Census block. We've got a huge data base that we've created now with a lot of this information and then we borrowed the maps from Mark through Curtis, and we put them together on the floor of my living room and we've been crawling for 5 days on our hands and knees across

these maps. And we looked at the way the things...the blocks and the tracts are designed, the blocks are the very tiniest units, usually that's a little tiny neighborhood, maybe bordered by two or three or four streets. And then those blocks are put together into a tract. Um...and we decided when we look at the census tracts that there were lines that were just defied any reason. They were... the doggedly, they ran helter-skelter all over the place and they...it looked...it..it not only looked bad, there was no reason for it. And so when we did our cut, we actually got down the maps and found the census blocks that were in unusual places and we straightened out the lines. Okay? So those were the...that's how we did this job, we did it manually and plugged the information into my database.

So I'm gonna ask for some help, I'm going to ask my husband, Sandra, if you want to help, um...I've got a map here and I'm gonna apologize in advance. We started this map late this afternoon, we got half of the map drawn, and I've got a little tiny map with the Island on it. So we want to show you what we've got, and the Commission needs to see this. Is it possible...Chuck, come on up, you can explain. Chucky's here, he can explain map to you. I didn't see him come in. Come in here, we have to give them our spill.

C. FLAHERTY: (INAUDIBLE-SPEAKING FAR FROM MIKE FROM AUDIENCE)

Boy, what an influence, yeah?

Okay, um...as Brenda said we um...the first thing that we started off with was the fact that District 6 or the southern district of this Island is going to be huge no matter what you do. Its gonna be cumbersome for whatever council person has to deal with it. Um...from what we had heard,

the map that was being preferred had Kealakekua Bay aligned with Volcano and down towards Mt. View in the same district which I and Brenda just didn't think was plausible. So, we looked more on the lines, aligning Ka;u and South Kona, both of which are rural, both of which are agricultural, and both of which are still relatively pristine open areas, as well as, have large populations of native Hawaiian peoples and who are seeking, you know, all of their practices. Um...the other thing we wanted to do was, we want to do what...as we're looking at these numbers, we realize that a Kailua-Kona district would be created. Ah...and so that's what we did. We created an urban light industrial, Kailua-Kona urban area which gives on the general plan, zones to be an urban area. And so we tried to include all the areas um... within Kailua that's scheduled for urban development within a district. Doing that allowed us to remove the Volcano Village an areas east from District 6, and moved District 6 up towards Kailua-Kona so that it includes a good deal of the Kona Coffee Belt. Ah.. we did try...we did look and tried to include the entire Kona Coffee Belt, um...in a district because of its importance to Hawaiian agriculture, but its just because of the distribution of the population, the way that the Island is, and having 9 council members, there's just no way to do it...or at least not at this time around.

So we got as much of the Kona Coffee Belt included in District 6 as we could, again, in keeping what the rural, agricultural nature of that. So we have an urban district for Kailua, then the district, and that would be District 7. The District 8 would then become what we call a residential resort community district that contains Kona International

Airport, (inaudible), as well as, Kawaihae Harbor, so some major transportation hubs for West Hawaii. And this entire coastline is slated for luxury golf course resort type

developments, as well as, the ancillary supporting communities that will be necessary for the workers, such as Waikoloa Village, which in itself had…we're really surprised that one of the census blocks that contain Wailokoa Village has 7,000 people in it. So it's a substantial number of people within that particular areas as well.

CHAIR: Mr. Flaherty, please hold up for a second.

C. FLAHERTY: Sure.

CHAIR: Since it is the Commission that you need…oh, I'm sorry, that and I'd like to be fair to everyone who signed up to speak. So the Commission members are pretty familiar with some of the things that you say. So if you just explain the map, as to where the boundaries are…

C. FLAHERTY: Okay.

CHAIR: …and leave the advocacy maybe for our meeting on October 18…I'm…

C. FLAHERTY: Sure

CHAIR: ….sure you'll appreciate it.

C. FLAHERTY: Well, anyway the challenge was to again bring communities together, so basically what we have is the North Hawaii district which is the communities of Hawi, Kapaau, those two, Waimea, as well as, Honokaa. Um… which is, of course, will serve the Kohala geographic area. We have North Hilo district which extends down the East coast to Kawaihae from Honokaa into actually, down into Hilo. Again, through Hilo urban…is essential Hilo which is sort of like central Hilo, and then we have basically a suburban Hilo area, which is also an urban area. And then we created two districts for Puna and we tried to draw as many Hawaiian Homelands as we could get it into the north Puna district and also south Puna district as you can see has already been drawn out on this wall. And the

only subdivision that we had to separate was the very small portion of Hawaiian Paradise Park. All of the other subdivision we were able to keep intact.

So basically that is the proposal that we came up with. We only had a week to do it, obviously we would have liked to had more time to be able to tweak a little bit more, creating a little bit more of a buffer zone around Waimea, for instance, because it is this the way the district is drawn right now. This comes rather close to that...to that area. But the concept that we came up with, the reason that we came up with this, we wanted to keep the urban areas represented by urban council people and rural agricultural areas represented by rural council people. And that represents, I mean, that is more degradable of the demographics of this Island, as well as, the geography um...of this Island as well. So obviously, there's no perfect solution but that is one that we came up with. Thank you.

CHAIR: Thank you. Um...if the both of you could sit up here, I have a couple of questions. Um...assuming that the Commission wants to work further with the map, we would appreciate if you would give us the information regarding the census blocks so that we can ask the staff to do more work with the census blocks that you worked on. Um...other than that I don't have any questions.

Does any other member of the Commission?

M. VAN PERNIS: You just said that there are 3 economic centers on the Island, Hilo, Kona and Waimea. We've heard quite a bit of testimonies that Puna considers itself to be an economic center, too. You didn't consider that to be another economic center?

B. FORD: (INAUDIBLE - SPEAKING FAR FROM MIKE)

M. VAN PERNIS: Do you think its appropriate to divide North Kohala from South Kohala and divide Hamakua in two districts when we've heard quite a bit of testimony and evidence of North Kohala basically is entirely West Hawaii oriented and its economic place both in terms of jobs, shopping or ...so what you do is basically divide Hamakua, and divide Kohala for the sake of creating two more Kona oriented districts. Do you think that's appropriate to divided North and South Kohala into two different districts.

B. FORD: Yes, I personally do, the fact remains that we have to have the right numbers, we all know this. If the fact also remains that even North Kohala and South Kohala may be West Hawaii oriented or Waimea oriented, it's the fact that we drawn these lines in a particular manner isn't going to stop that, we're still going to be involved with this. We thought it was most important and we have the numbers to justify it that south...the South Point area, all of that area, Kailua urban area, the North Kona, South Kohala section and the North Kohala have representatives inside those districts representing the West Hawaii perspective. And most of these other maps basically give us, we representatives on this side of the Island, because they drag Ka'u and South Kona all the way over to Puna...

CHAIR: Oh....

B. FORD: ...and we thing that's totally inappropriate.

M. VAN PERNIS: So basically you devised this to basically create corner districts where representatives and move the lines forward and move the rest of the area....

B. FORD: No, we did not let the lines go where they may. We did the very best job we could to make this reasonable

cut. We believe that Puna is with the numbers and entitle them to two districts, our numbers entitled us to four. Its not....its not a matter of trying to do somebody out of something, we have the numbers to justify this.

M. VAN PERNIS: And your District 6, where is this northern boundary?

B. FORD: Its um...Chucky what's the northern boundary on 6?

C. FLAHERTY: It runs...it runs just from the south of Keauhou Bay, basically up mauka.

M. VAN PERNIS: So Keauhou Bay does it run Kahaluu for instance?

C. FLAHERTY: I'm sorry?

M. VAN PERNIS: Does it run as far as Kahaluu?

C. FLAHERTY: Ah...no.

M. VAN PERNIS: Is it on the north side of Keauhou Bay?

C. FLAHERTY: No, its on the south side of Keauhou Bay and it runs through an area which at this point is relatively undeveloped. It runs through these ...through the south of Keauhou Bay Estates, south of the golf course, it runs north of the Hokolei'a Development that's basically a very open ranch land type of area at this point. So it is sort of a natural demographic break, so...

M. VAN PERNIS: So, its between Kainaliu and Keauhou Estates?

C. FLAHERTY: Its between ...its between Kainaliu, it runs basically through the Honalo area.

M. VAN PERNIS: And would you feel that students ....oh, that's all right (referring to B. Ford)...students who reside here are not entitled to representation?

C. FLAHERTY: Ah...Brenda would like to address that.

B. FORD: (INAUDIBLE-SPEAKING AWAY FROM MIKE)

M. VAN PERNIS: Okay.

C. FLAHERTY: There's two things I'd like to say. One thing is, all the other plans divide Kailua Village in half.

CHAIR: Ms. Ford, would you simply answer the question?

B. FORD: The students...no, I do not believe that non-resident students who have homes on some other Island or some other continent should be voting in our State and should not be included in our census data base.

M. VAN PERNIS: Even if they're registered to vote?

B. FORD: If they're registered to vote and their non-resident students, they are not telling the truth.

M. VAN PERNIS: Or do you feel that ah...if they're living here the majority of the time are they entitled to representation?

B. FORD: My opinion is, if they are a legal resident someplace else, then they vote someplace else. If they are legally a resident here, then they shouldn't...then they won't be paying non-resident fees to the university, because then they are legally a resident. My son spent a year as a Honolulu resident...

M. VAN PERNIS: Are you that if a person votes here they are entitled to representation. If they don't vote here, they are not entitled to representation.

B. FORD: Yes.

M. VAN PERNIS: So all of the kids here are too young to vote and are not entitled....

B. FORD: No.

There...if you are a child of a legal resident here, then you have...you should have complete representation. That's what the census is all about.

M. VAN PERNIS: But if you are a legal resident but are not registered to vote?

B. FORD: How can you be a legal resident and not be registered to vote?

We have friends that are registered in other states. We have snowbirds that come in and...

M. VAN PERNIS: There's lots of people ...

B. FORD: Okay. Yes, you're...

M. VAN PERNIS: If you're not registered to vote or...

B. FORD: Then they can't vote (emphasized). Then why...why would they be counted?

They're probably counted in the census population, I don't think that the students who are non-residents should be part of our census space, and they are excluded by the State.

CHAIR: Mr. Pavao?

S. PAVAO: Why...I don't know what the right word would be but why is District 4 - 5 and why is District 4 -5?

B. FORD: That's the way the districts are today. And the numbers are really immaterial, but right now, South Puna is..

S. PAVAO: If you look through the numbers the logical sequence would go 1 - 2- 3 - 4 - 5...and

B. FORD: I numbered them the way it exists today. They can be renumbered or relettered if that's...

S. PAVAO: But that's the way it exists today, and the number...

B. FORD: Julie, what district are you in?

S. PAVAO: 6.

B. FORD: 6?

S. PAVAO: That District 4 is 5.

B. FORD: Okay. That's....I can get in a race [sic - eraser] 8 and take care of that.

S. PAVAO: The other two questions I have is, maybe I'm wrong...you don't tell me what tax block the school is. As I count it, I count 10 districts, maybe you have opened up another ....

B. FORD: No, no, no.

(END OF TAPE 1)

Even worst than that some of the census blocks have

three or four thousand people in them. And so it makes it real awkward trying to separate them. I...I don't know if you can do anything about it, but whatever, its Hawaiian Paradise Park.

J. FERGUSON: All right, the next question is how many people were cut and put into another area?

B. FORD: It went...we went district by district. and we took the census....we tried to...

J. FERGUSON: Just on the map you substituted, how many people…?

B. FORD: I have to look at the database. I'm not even going to guess.

J. FERGUSON: And ah…how many students?

B. FORD: Seven hundred thirty eight non-residents students.

J. FERGUSON: Seven hundred thirty eight?

B. FORD: That's from the State and 62 active military. No numbers yet on the others.

CHAIR: Thank you very much. Any other member have a question for Ms. Ford?

Mark?

M. VAN PERNIS: I see you split 7…you split mauka from makai in your District 7, all right? Is that split along Mamalahoa Highway?

B. FORD: Part of it. Um…Chucky, I can't…this map doesn't have the streets on.

M. VAN PERNIS: So basically, you decided to put the makai side of Mamalahoa Highway…

C. FLAHERTY: No.

M. VAN PERNIS: …In District 7 and the makai side in District 8?

C. FLAHERTY: UM…Mamalahoa Highway…Okay…

M. VAN PERNIS: I'm sorry, I can't see it.

C. FLAHERTY: Where Mamalahoa Highway splits from Kuakini in Honalo. Okay, we basically included District 8...excuse me, District 6 basically goes all the way to...

M. VAN PERNIS: I'm talking about District 7 only.

C. FLAHERTY: Oh, District 7 only?

M. VAN PERNIS: Your District 7.

C. FLAHERTY: Its basically from Kuakini mauka until you get into the area of the Department of Water Supply Road, then it goes up at that point, I believe, and follow...where is it? So, it basically follows Kuakini, then it goes back up um...I'm trying to see...

M. VAN PERNIS: That longest stretch from south to north, is it along Mamalahoa? It appears to be.

C. FLAHERTY: At the very bottom?

M. VAN PERNIS: No, at the top, that longest stretch.

C. FLAHERTY: Yes, that's Mamalahoa Highway, it comes down, you see it comes down with an indention, that is the area below Holualoa which is the coffee growing region then it comes back up to where there's a lot of urban development..

M. VAN PERNIS: Well, Holualoa is not...well, you can call it coffee but its more urban than anything else, it's a bigger community than Kailua-Kona, I live there. But the point I'm making is that you felt that it was appropriate to divide 7 from 8, at least for a significant portion by Mamalahoa Highway?

C. FLAHERTY: Um...we did the best we could, certainly someone elses work ...

M. VAN PERNIS: I appreciate your effort. I'm just trying to get information, but I'm wondering whether you split that because of geography because you felt there was some cultural or economic difference between the mauka and makai side.

C. FLAHERTY: We were looking....we were trying to look at economic differences, people who...and lifestyle differences, people who were more, for instance, in town versus people who prefer a more rural environment, um...suburban, to me is more people who are utilizing an urban whereas rural is someone who doesn't necessarily have a need to go into town.

M. VAN PERNIS: Is this on Mamalahoa north or south Palani Road?

S. PAVAO: North.

C. FLAHTERY: As far as?

M. VAN PERNIS: This division. Is it on Mamalahoa, north of Palani Road?

C. FLAHERTY: No.

M. VAN PERNIS: Thank you.

C. FLAHERTY: No. We weren't able to...we weren't able to because of the numbers unfortunately.

CHAIR: Thank you very much. Thank you both very much.

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CHAIR: Sandra Scarr?

S. SCARR: Good evening, thank you for coming over to Kona, and thank you for listening to us, and I guess as you can see that many people in Kona are very concerned about how our districts are construed. I'd rather you listen

(inaudible-speaking away from mike). I am speaking to all of you. Let me speak first to you.

Um...thank you for coming and I appreciate your listening to us, and I think we thought a lot about the guidelines under which you're working, which is to draw contiguous districts that are not too favor any...or disfavor any existing arrangement, or person. All right?

And I think it was very hard for us to say, okay, let's think ten years ahead. Let's think what our County is going to look like in ten years. Where is it going to grow, where do we need to predict what kinds of economic and demographic interests people will have in common. And I think that what Brenda and Larry...Brenda and Chucky had presented and Larry, as well, has such compelling underlying interests. Let me, I want to say them again.

If you take the area from Ka'u through South Kona and then the mauka lands of North Kona where people are farming, you have a solid agricultural district and you would have a representative elected from that area representing agricultural interests. I also live in Holualoa and I'm a coffee farmer so I...I feel that strongly...that, that's a very important group not to be deluded by the growing urban numbers. Now, speaking for the urban Kailua-Kona district there is no reason that 20 thousand people who could be construed as being as being in urban Kailua-Kona that's certainly a council district. Why should we be divided? Why should Kailua-Kona have to have half its representation in one district and half in another? Its seems sensible at this point in time, and maybe it wasn't sensible ten years ago but its sensible now and henceforth to say, "Kona deserves a council district all in itself, Kailua-Kona". And then we have the suburban people on the north side of North Kona who orient some to Kailua-Kona but some to Waikoloa. There are people...some of them

who work out in the resorts. Then you have Waikoloa Village, surely, a lot of those people are working in the resorts and up north. And then you have many developing residential areas in North Kohala, north of Kawaihae. I drove up that area just less than two week ago, and its astounding how much luxury resorts, luxury subdivisions are going in up there. So, there's a lot of coherence between the resort areas of south Kohala and the resort areas of north Kohala. But when you get past, you know, before you get to Hawi, now you still got traditional sugar lands, cane workers, ex-cane workers, resident...rural agricultural and ranching people. And that extends all the way back down to Waimea but on the north side. So I'm saying there's a lot of coherence to what Brenda Ford and Chuck Flaherty had presented to you in those districts. I think we feel less confident, I will speak for myself about speaking to the people of Hamakua or speaking to the people of Puna. And I think you've heard from them as to what they want. But I think talking about West Hawaii, we do have some knowledge and we do really think that this presents at least the beginnings of a very good plan, and we'd like you to take it seriously.

Thank you.

CHAIR: Thank you. Do any of the members OF THE Commission have questions of Ms. Scarr?

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David Holzman?

D. HOLZMAN: My name is David Holzman. I live in Kailua and I'll read along with you here so the audience can hear it. First for all, aloha and thank you for giving us this opportunity. I know your guiding principle has to be one person-one vote and you're not bound to please anyone, its just not possible and I commend you for taking

on a difficult responsibility. In the hope of not making your job more difficult, I wish to make a suggestion on how you can enhance and make more perfect the principle of one person-one vote. Sections 37- 317 of the County Charter, Item 4, states the Reapportionment Commission shall determine equal population districts as required by a applicable State Constitutional provisions. Now our Charter does not spell out what those applicable State Constitutional provisions are. So I went and lookedthem up. The Hawaii State Constitution, Article 4, Section 6, ask you to be guided when practical, I guess you know these, by the criteria of not favoring political parties, districts should be contiguous, compact and easily recognizable geographic features, and don't mix different socialeconomic areas. That's what I think has been overlooked so far. Don't mix different socialeconomic areas. However, on the criteria of different social-economic areas, the Constitution ask the Caveat that submerging one area in another district with a substantially different socialeconomic interest shall not be...shall be avoided. Now that's the only one of those provisions that Constitution then says, shall be avoided. This Caveat is very applicable to our County and I will present reasons why it should adhered to.

First I want to call your attention to the Constitutional Convention of 1968, Section 5, which reads as follows:

Whenever possible, the division of areas with substantial community interest (socialeconomics) is to be avoided. That homogenous group should participate in the political process as a unit, rather than be split up arbitrarily into small fractions of two or more groups. The homogenous groups, your committee needs to decide, the numbers of which are alike in the social-economics status to the extent possible, your committee believes that areas with substantial community interests shall not be divided.

Now this criterion of not dividing social-economic groups has been challenged and upheld in State and Federal courts. First, your Supreme Court with Burns v. Richardson 1963 and again Burns vs. Gill 1972, those are Hawaiian challenges to the Constitution. The Federal courts found that artificially chopping up canoe districts results in a complete loss of meaningful representation. Now I believe the Constitution is exclusive on this point, and the Federal courts agree that because it gets to the heart of equal representation under the Law and compliments and makes more perfect the importance of the one person-one vote. Think of it. If you put equal numbers of people in each district, you have not necessarily given equal rights to each person's vote. Because of one social-economic group is in the minority, and of a lower status and has different needs than the majority higher status group, you've weakened the political power of the minority group . '

Now, there are several different methods that identifies social-economic status. But more social side is generally agreed that it is comprised of the factors that gives people and their children similar-like chances to achieve a higher quality of life. Those factors are primarily family income, educational level and political power. When you look at the Hawaii County Data Book of family income, educational level and unemployment rates, which is related to income, you will find 3, a defined clusters of social-economic groups. One is Hilo, urban area has been stated, the other is Kailua-Kona urban area and the third is Puna. If you look at the other districts, we are fairly close to the County average of social-economic status.

As Brenda and Charlie pointed out, it tends to be more rural. And some were income and some were educational levels. The census data shows, many of you know

intuitably, that Puna has a lower family income, a low educational level than Hilo or Kailua-Kona. The family income differences can be as much as 2 to 1, between Hilo and Puna and Kailua and Puna. Educational levels are twice as high in Hilo, than Kailua-Kona as in Puna. Unemployment last year 2000 was 50% higher in Puna than Hilo and over 1 hundred per cent higher than in Kailua-Kona. So given that low family income and educational level to citizens of Puna and their children have very little chance of bettering their lives compared to the 9 political representation. Political representation is difficult at best, but almost impossible if elected officials have to represent 2 widely different socialeconomic populations. It becomes a tough juggling act to submit capital improvements needs, offer legislative remedies and keeps folks on the needs of your constituents.

Now because social-economic status is highly correlated with the types and frequencies of criminal offenses and the need of social services, consideration should be given to following the judicial district boundaries in the County as much as possible. As you know, the police, fire, public works, parks and recreation, and the courts are all organized by judicial districts. Therefore, to use judicial districts as the guiding principle and take care not to split the three socio-economic defined groups of Hilo, Kailua-Kona and Puna, you'll go a long way to the needs of the people with their political representatives and the social services, and the safety of fire and police protection that they need. This is very doable because north and south Hilo judicial districts of the population, 49, 106, the three council districts, the Puna judicial district has enough population, 31, 335 for two council districts, and the north and south Kona judicial districts have more than enough, 37,132 for two council districts. Since north and south Kona have excess population, it becomes necessary to look for

equita...equitable ways to figure the south, north and remainder of the west areas. I leave that up to you and to your Office of Elections staff. That I don't want to get into, I see what happens when you get into that. I urge the Commission to ask the County Office of Elections to prepare a new map, a map that gives the highest priority of the several constitutional criteria to social-economic status, and above all avoid splitting upper Puna into 2 districts, one of which is Hilo. Where the maps start as key, therefore, I order you...in order, excuse me...I order you...I take that back. Excuse me. In order to keep faith with our State Constitution I recommend the maps to start at the judicial district between Hilo and Puna.

One last statement. When the Hawaiians started their society along naha ahupuaas, they wisely guaranteed that each group had access to all that is necessary to their quality of life. Everyone in the Island could access to the forest for wood, the midlands for agriculture and the ocean for fish. The alii did this to minimize the conflicts between the groups. Look ahead ten years from now, and you should be as wise because we all live on an Island and one segment is to deny access to the means of improving the quality of their lives we will never truly enjoy our harmonious Island.

CHAIR: Thank you very much. Any member of the Commission have a question for Mr. Holzman?

M. VAN PERNIS: Mr. Holzman, I didn't get it but where do you live?

D. HOLZMAN: I live in Kailua.

M. VAN PERNIS: And ah...do I understand you right, you are advocating the poor folks be in one district and the rich folks in another district and so on and so forth?

D. HOLZMAN: Ah...that's where the poor folks live and that's where the rich folks live.

LADY FROM THE AUDIENCE: (INAUDIBLE-FAR FROM MIKE)

M. VAN PERNIS: So you're basically advocating that the division by economic divisions is more important than getting the numbers right?

D. HOLZMAN: No, I didn't say that.

M. VAN PERNIS: But you want the numbers divided so that the poor won't be all in one district and the average and rich are all in another districts?

D. HOLZMAN: No, I didn't say that either.

M. VAN PERNIS: Well, that's the way I hear you're saying.

D. HOLZMAN: Well, you better listen to what I'm saying, I said there are two urban areas with higher educational levels and higher income and that's Hilo and Kona...Kailua-Kona basically.

M. VAN PERNIS: So you're basically advocating two... all poor folks be in two districts, right?

D. HOLZMAN: You're making it sound like I'm kicking the poor people into Puna, I didn't didn't put people in Puna, but I'm looking at the County Data Book....

M. VAN PERNIS: But you're advocating that the... that they not be mixed with the socio-economic...

D. HOLZMAN: That they can't get out, that I'm putting a bridge and I'm tearing down barriers?

M. VAN PERNIS: For instance, would you be satsfied....would you be satisfied if there was a district that had 3 quarter of the poor people in it and 1 quarter of the middle class and upper class in it so the poor people can still control the district?

D. HOLZMAN: That's highly hypothetical, I'm not going to respond to it.

M. VAN PERNIS: If its hypothetical, you see it on 3 maps here.

D. HOLZMAN: Where is that? Show me the socio-economic status of those maps. You can't do it! (emphasized)

M. VAN PERNIS: I can't do it, sir. But the point I'm making is that you seem to be advocating Ms. Jacobson's plan, is that correct?

D. HOLZMAN: No.

M. VAN PERNIS: Okay, the two perfect districts for Puna and the rest you say, leave it to us to work out?

D. HOLZMAN: I say, follow the Constitution, not split socio-economic groups. As a sociologist, I have a PHD in sociology, and I can tell you there are only 3 identifiable,

clearly identifiable, statistically significant socio -economic groups, one is in Hilo, one is in Kailua, and one is in Puna, upper and lower Puna.

M. VAN PERNIS: And....

D. HOLZMAN: That is statistically significant socio-economic groups.

M. VAN PERNIS: How about the Kohalas? Where do they fall?

D. HOLZMAN: Close to the average.

M. VAN PERNIS: They do...and you're sure?

D. HOLZMAN: Of course, you're gonna find pockets here and there, yeah.

M. VAN PERNIS: Well, there's some very rich folks in Kohala and some very poor folks in Kohala, so together they are average.

D. HOLZMAN: Some of those poor folks aren't even residents there.

M. VAN PERNIS: Now, um...you said you'd leave it to us, you've advocated two districts in Puna and two districts in Hilo and you'd leave the rest to us...

D. HOLZMAN: 3....3....3.

M. VAN PERNIS: 3 in Hilo and and you'd leave the rest to us and...

D. HOLZMAN: And 2 in Kailua.

M. VAN PERNIS: 2 in Kailua and you leave...and how much of the ah...south part of the Island would you put in the Kailua district?

D. HOLZMAN: I have no idea on that.

M. VAN PERNIS: And how much of the ah...Hamakua ah...districts would you put in the Kohala.

D. HOLZMAN: You have my presentation, I didn't make a single statement about where you put those.

M. VAN PERNIS: So you don't have any idea how the splits goes?

D. HOLZMAN: I gave you a guiding principle, Constitutional principle...

M. VAN PERNIS: All right.

D. HOLZMAN: And I gave you the 3 sociio-economic groups, I gave you the judicial districts, I make no other claim, I have no other knowledge that I wish to present to you tonight.

M. VAN PERNIS: And if we need to make some other division of the Kona, Puna and Hilo districts in order to accommodate these other geographic areas in order to meet the one man-one vote principle, you are for or against that?

D. HOLZMAN: For what?

M. VAN PERNIS: In order to meet the one man-one vote principle we would have ...

D. HOLZMAN: That was the first part of the question?

M. VAN PERNIS: If we had to divided up Puna, divided up Kailua-Kona, divide up West Hawaii, divide up Hilo and add to parts of Hamakua or the south part of the Island, in order to meet the mandate of one man-one vote, would you say that the socio-economic requirements are more important?

D. HOLZMAN: Is there one answer to that question?

M. VAN PERNIS: I'm asking you, sir.

D. HOLZMAN: Listen to what I'm trying to say. We have one voteone person, one person-one vote. But if you put those people in predominantly social... predominantly....don't take exception, predominantly, different, socially-economic groups, the Constitution, the Supreme Court, and the Federal Court will tell you, you have violated the Reapportionment rules.

M. VAN PERNIS: You have defined as I understand it, 3 districts?

D. HOLZMAN: Correct.

M. VAN PERNIS: Is that correct?

D. HOLZMAN: I...no, no. I have defined 3 socio-economic groups.

M. VAN PERNIS: All right.

D. HOLZMAN: Well, I used to call it

M. VAN PERNIS: You're advocating based on your logic, 2 districts in Puna, correct?

D. HOLZMAN: They have the numbers.

M. VAN PERNIS: And you're advocating 2 districts in West Hawaii?

D. HOLZMAN: No, I didn't say anything about West Hawaii.

M. VAN PERNIS: Well, 2 districts in Kona..

D. HOLZMAN: Ah....Kona, yes.

M. VAN PERNIS: All right. Is there any difference between that and West Hawaii, I'll accept that. And how many districts in Hilo?

D. HOLZMAN: I said that already, 3.

M. VAN PERNIS: All right, that's 7 districts, right?

D. HOLZMAN: Oh, God. Oh, man. What did you do?

M. VAN PERNIS: Isn't that 7 districts?

D. HOLZMAN: What....what? No, listen. I'm not going to answer those silly questions like that.

M. VAN PERNIS: Well...

D. HOLZMAN: Its so hypothetical, I mean....

M. VAN PERNIS: Well...

D. HOLZMAN: I gave you my presentation, I told you what I had to offer, and you got me playing a numbers game....

M. VAN PERNIS: Well...

D. HOLZMAN: And now you tricked me in a numbers game.

Ooh...good for you.

M. VAN PERNIS: You've advocated 7 districts....

D. HOLZMAN: I have not advocated 7 districts! (emphasized)

M. VAN PERNIS: ...and I want to know...

D. HOLZMAN: I have not advocated 7 districts and in answer to your silly questions, I still say, I don't know!

M. VAN PERNIS: All right, that's what I wanted to hear.

D. HOLZMAN: Thank you.

CHAIR: Do any other member of the Commission have a question for Mr. Holzman?

Mr. Holzman, thank you very much.

.....

This concludes our public hearing.

HEARING ENDED AT 9:40 P.M.

TRANSCRIPT OF REAPPORTIONMENT COMMISSION MEETING
Of
October 18, 2001 at 9:00 a.m.
Hawaii County Councilroom
25 Aupuni Street
Hilo, Hawaii 96720
Session 4

(Partial Transcription)

Page 5:

CHAIR: Let me move on then, simply call the people in order of the notices that I have here.

I would like to get and I would like to impose some reasonable limits on..in terms of their statements to the Commission and I would ask that each of you providing statements attempt to keep your comments to no more than 5 minutes. I believe looking at what we have here, that the members of the Commission have heard from each of you at least once. So having said that, the first note I have here is - from Charles Flaherty and Brenda Ford.

Mr. Flaherty, Ms. Ford?

B. FORD: I'm Brenda Ford of Captain Cook, and I'd like to start off by um..clearing up some possible misconception. Last time I spoke before this Commission about ten days ago, I made a comment about the Elections Office and my inability to get the information I needed from the Election Office. And I am afraid that it might have been perceived as the Elections Office not being supportive. And that is not the intent that I had specifically talking about the database

that I work with. The Elections Office personnel workers were gracious, they were informative and they were helpful at all times. I could not have started this without that assistance. And more importantly, they gave me the phone number of the State person. So I want to make sure that the Elections Office did a wonderful job for me.

We've handed out a revised map, you know, the last time we came here we did not have it colored out where we wanted it colored out, and had to make some few refinements. Chucky will talk about those, and we've given you comments, and Chucky will be making a little chart that explains things like the number of people in each district, the deviations and target populations, and the urban districts. And I'll let Chucky take over from here.

C. FLAHERTY: Good morning.

As this is provided as written testimony, I won't read this entire submission to you to save time. Basically, what we've done with this map is to recognize the urban areas of the Island of Hawaii as deserving of districts. And that central Hilo, and southeast Hilo, as well as, Kailua-Kona, Keauhou-Kailua-Kona areas, are..have sufficient population. Actually, Kailua-Kona has more that sufficient population for an urban district, and we're forced to divide the ahupua'a of Kealakehe in order to create this urban district so that the mountain portion of Kealakehe is actually in District 8 which extends up to the northern part of this district to the South Kohala-North Kohala boundary.

The map does bring together the sort of resort, residential retirement area of West Hawaii into District 8. District 9 is a north Hawaii district which is ranchland and rural agricultural area. Then district-wise you have toward the

east side of the Island is a basically rural area with most of the population being sort of a suburban north Hilo area, as well.

I covered the central and southeast Hilo districts which central Hilo contains the downtown area and mauka urban, commercial and industrial areas of Hilo, while the south and east of Hilo contains the international airport, the harbor, Keaukaha and wraps around containing the portions of suburban, urban Hilo.

Puna, north Puna is basically the northern part of Puna, with some area of Ka'u situated with Volcano Village and the National Park.

And then south Puna, we put as a separate region because of its accessibility. It's only one way to get to that area. And we did include the entire area of Hawaiian Paradise Park and Ainaloa in South Puna, as well.

As you can see the variations, the deviations on our numbers are within the parameters of less that 5% which was our goal and basically the map that we presented has its basis, the social economic demographics of the different areas of the Island, as well as, economic activities that we see occurring over the next ten years.

If you have any questions, I will be happy to answer them.

CHAIR: Any members of the Commission?

Hearing none, thank you very much. Next is Al Konishi.

A 102

REAPPORTIONMENT COMMISSION
25 Aupuni Street, #100
Hilo, Hawaii 96720
Phone: 961 8277
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TRANSCRIPT MEETING OF
HAWAII COUNTY REAPPORTION COMMISSION
November 21, 2001
10:00 a.m.
Waimea Community Center
Kamuela, Hawaii
(Partial Transcript)

Page 15:

SANDRA SCARR: The commonality of interest between Ka'u and South Kona is pretty clear. Someone pointed out just a moment ago, that in fact a lot ...this is really a large agricultural area. So I would argue with you that this map and it isn't you know...it may be some some tweaking around the edges but in fact this map comes in with ..within the plus or minus 5% that you require, and I think you should require for any map, would population, and it does a better job than you're doing with putting the minuses into the areas of rapid growth. Unfortunately, in your map the areas that are currently plus over in population are the most rapidly growing areas. The ones are under population are those that will not be growing very much in the coming years, as far as we can project. That means that two years from now, or three years from now, you will have exceeded your 5% deviation and you will know that. You already know that, that's what's going to happen. So would argue with you, this isn't a very acceptable map.

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CHAIR: Any other member of the Commission have a question?

Hearing none, thank you very much, Mr. Martin.

Ms. Ford? Brenda Ford?

B. FORD: I've come to the meeting here in Waimea to explain some of the points of the process and the result of the plan that surges accordingly. But I had some input, too.

First thing I'd like to talk about is just basic raw data. When we started, when we were first requested to do an analysis of the raw census data, that is without any exclusions whatsoever, to determine if any of the 9 maps this Commission had been working on at that time, met, what we felt the constitutional guidelines. The first thing that popped out of the U.S. Data on a census tract basis, census tracts being the larger geographical areas filled in by the small census blocks, you're familiar with this. The first thing that popped out of that data was that there was a justification for two urban Hilo districts, which Ms. Scarr has already discussed, and one North Hilo, Hamakua district, and let me clarify the misinformation what has been presented by some individuals, the North Hilo district in our plan consists...is that suburban area of North Hilo, plus a 21 % of the Hamakua population. We had to do a split. As we all know, because I have done the same process that you've gone through, lines have to be drawn somewhere. And you still have to meet constitutional guidelines of plus or minus the 5%. We all know that, we've all done the same process. So the question becomes what is the raw data telling you? So the raw data says, two urban Hilo districts, a North Hilo district, two full Puna districts, one full Kailua urban district, a southern district, whatever you want to call it. If you want to call it South Kona- Ka'u or some other name, southwestern Hawaii, but

the name is or the district number is immaterial. The fact is, if the justification in that portion of the Island in the south, southwest are full council seats. And then you get the Kohala and with all due respect to the people of Kohala, they have exactly the same feelings as the same people of Puna, they don't want to see their district fractured. But while Puna can justify two full council seats, Kohala is in a precarious position. Because Kohala has 120% of a districts. That means they can justify one full legal district and 20% of Kohala has got to go legally someplace else. Whether it goes south to the Kona, or it goes east to the Hamakua-Hilo area, doesn't matter. Or even if it is split between those two things. 20% of Kohala legally must go someplace else. So the question when you look at the raw data and you look at the census tracts, and these numbers come jumping off the page at you, the question is, once you accept the basic premise of two urban Hilo districts, a North Hilo district, two Puna districts, a southern districts, a Kailua district, urban district, a northwest area which is in our plancs called District 8, and a north district, North Hawaii which is, then the question is, how do you divide these districts up to meet constitutional parameters. And that's why the...what we call the Hawaii county constitutional redistrict plan which you're not calling the CERG plan which has been called all kinds of things, but its this one (pointing to map), that's the reason we chose to do this.

Now when we did this plan, we did it without regard to any incumbents and where they lived, in fact, most of the incumbents we don't know e\where they live and we don't care where they live. We did it without regard to political parties, I had to explain to someone before this meeting, that I personally am independent. I'm not a Republican, I'm not a Democrat, I'm not Green, I'm not purple. I'm just an independent. I vote for the person that I think is best for the position. And when we did this map, we did not care about

a political party, and in fact in our County Elections in the future they're not partisan. So it makes no differenct. What some of these political persuasion is.

Excepting the basic premise that the County had to be divided up as I have described it, and that Kohala has 20 % too many people to keep inside of one district, we haven't decided where in Kohala to draw a line. And what we chose to do in this plan is to draw the line between North and South Kohala. We...we felt because of the people we knew in the Waikoloa area, Waikoloa being an upscale suburban area was appropriately placed into the North Kona district, northwest, if you want to call it something else , this district here (pointing to map), because of the demographics of that area. We had heard through some of the public testimony that was very important to people in Waimea that Waimea stay together. And so when we drew our line we made sure that we kept all of the town of Waimea together. Unlike the County Commission's plan which divides the town of Waimea which we think is an inappropriate division. Not only inappropriate but unnecessary. You know you can get to ...the difference between illegal and you can do inappropriate and you can do if not necessary. That's a continuum and you want to get to a point of that continumum...continuum is the most reasonable choice. And we felt that to make the most reasonable choice we should keep Waimea as intact as we possible could. And that's why we chose to make the line the way we did. We consider the sociodemographics of the North Kohala area as being close to Hamakua.

Now I need to correct another piece of misinformation you were given this morning. The 79 or 80% depending on which fraction you use, if you round off or round down, this is North Kohala's (pointing of map) district as it stands today, plus 79% of the population of Hamakua which is located on this side of the North and South dividing line,

we kept it with, in this area because its physically closer to Waimea. I'm not saying that people don't work in Hilo, I live in South Kona and I work in South Kohala, that doesn't mean that I should have a representative from South Kohala representing my interests. Where I live should be represented by a person who lives in a same community as I do, not where my paycheck is coming from..

(end of tape)

...There's the Volcanoes and the craters, and the military bases, you know, there's no people. Swapping land around in this area to make it more reasonable doesn't matter, because its emply. It doesn't matter. So what we did when we went to this plan is the first area that we felt really needed major, major help was Puna. If there's a community that has ripped to shreds in the last ten years, its Puna. Just look at the map that you propose, you're doing exactly the same, not exactly, almost the same thing, by taking portions of Puna and putting it in other districts. Those districts today, if you're doing a snapshot, those districts today are dominated by Hilo which is not right. There's no reason to have more Puna dominated by anyone, they are legally entitled to their own council representative. You can't have it both ways, you can't say we're gonna disregard the future growth in different areas, and because in sometime in the future, they're gonna dominate these three districts. You can't use that argument and then say its okay to fracture them and let them be dominated by Hilo. It is no more correct for Hilo to dominate Puna than it is for Puna to dominate Hilo.

On multiple occasions, I've explained to one of your Commissioners, Mr. Van Pernis, that it is no more correct for South Kona to dominate Puna than it is for Puna to dominate South Kona, or Ka'u. First of all, Puna and South Kona are not contiguous and despite the fact this map has

been drawn in this manner, this is completely unnecessary way to cut this map up.

In the map that we have drawn, you will notice that Puna stops and only the Volcano portion, Volcano Village area is attached to Puna. It is only 15 miles from Puna, their centered interest is Puna, but when you get down to Ka'u, those people have a community interest that is more aligned with South Puna as they have said many times in many meetings, not just in Puna meetings, but other meetings. It's time to put these communities together, its time to make sure that these communities are not dragged across the Island. I heard one person say in a private meeting, that well, if you want to continue doing this, why not just drawing lines radiating out from Hilo, and have all the Council people living within a few miles from each other from Hilo and dominating these other sections, That's not appropriate it was a very facetious remark, but its not appropriate. For any areas dominating another area because we draw lines, so they can be dominated. We need to draw the lines so communities of interests stay together.

When we did our preliminary report, we were chastised because we had divided one of the subdivisions inside of Puna. We went back to the drawing board. There is no subdivision in Puna that has any divisions in it at all. All subdivisions are intact. That was one of the goals that we went back and corrected. We followed all the constitutional, State Law, County Charters, and federal case law to do this map the best way we could. We feel this map is better than the County map, and I'll give you a reason, you have a spread currently on this map you're proposing of 9%. You go from a plus 5 to a minus 4%.

The map that we submitted on October 8, has a spread of 5%. 5%, there's a 4% improvement with just this map in the deviation. Right there, there's an improvement. It means

you don't have to cut up, pardon me, you don't have to cut up all these different districts in all of these strange ways, and you can still improve the deviation factor. And we think that that's something that you should be looking at. Why does your deviation factor have to be a spread of 9% when you were given a ...given a map, not a perfect map, but a good map that had a 5% spread six weeks ago. That map is thrown out. There's also been some misinformation presented to you about one of your original maps, that on the west side shows something similar to this. As I said in multiple meetings and to Mr. Van Pernis before this meeting, you cannot consider just one area of the Island. You have to consider the entire Island because one side of the maps may look similar to somebody's map, this side (pointing to map), it doesn't make any difference if you screw the other side of the Island, or you screwed the some other district, you have to be willing to do some compromising, and you have to be willing to consider the best interest of all the different areas. We believe that we've done that. We've never said that this is the one and only perfect map, we've never said that. There is no such thing, and you know it, more than anyone else. You guys have been going through this really horrendous process.

But in our process we did something a little different and that is we got the maps that we did not have the benefit of a computer program. We had to sit down and tape maps all across my living room floor and literally crawl around in these maps and pulled the census blocks off one at a time. And because we did that and I don't recommend it, its very bad on the health of the back, not to say one's disposition, but once you get down to the census block areas, census block levels and you start moving these things around, you can see where there are serious problems in a particular community, as far as the census. For instance, there are blocks in more than one side of the Island, more than one

place on the Island where the census blocks even though they meet the parameters of between 503 thousand. It makes no difference. The blocks are huge geographically, they may have way too many people in them, or too few people in them, and you can't divide a census block without this Commission going and saying to the U.S. government we want to buy this census block, I believe you have that right. You can't do it so you wind up taking a census block that maybe has one or two thousand people in it and having to move it in mass to something else. And we ran into that problem in Hilo, and we ran into that problem in urban Kailua. It's a very big problem. But we did the best we could but the fact that we are in a spread of 5%, compared to 9%, tells us we did something pretty good because or deviation isn't as bad.

Now, there was another piece of information presented by one of the Commissioners here about the south Keauhou area dominating, what we are calling District 6, and the district numbers are immaterial. They can call it "A to F" or "A to J" or whatever you want to call it, it makes no difference, but the blue area on this map. Commissioner Van Pernis specifically say...said that the Keauhou area was going to dominate this entire district because they had more numbers. That's not true. The truth is, those people in that area, that slight bit of that area south of Keauhou have less than 3,000 people. Well, the district itself has over 16, 400 or 500 people, depending who number you want to use, people in it. Ka'u itself has almost 10,000 people in it. So whose going to dominate that district, it doesn't make much difference, but it isn't gonna 3,000 people in Keauhou unless they have a candidate who can convince the other rest of the district that they can adequately represent the

rest of the district. That's what our political process is about, having people campaign each other for the right to represent a district. And numbers isn't the only thing that gets it, after all Julie Jacobson was in Puna and she got everybody…enough people to vote for her that she had this whole district (pointing to map). So its more than just a number situation. So I …I have to tell this Commission that it really pains me to have to come here and correct misinformation and untruthful statements and it really bothers me the community has not really been listened to. I know people say, oh, we're listening but we're being disregarded.

More than that, we've been treated very, very rudely. Our elders have been maligned in public, we're here to give you our input and tell you why we want something the way we want it. Well, they we're right or whether we're wrong. And it is the job of this Commission to evaluate our comments and to use them in the best way possible.

I propose that at this point in time, and I have…ah..this map that has been supported by the a lot of the members of the community, both in Puna and West Hawaii, and I hope Kohala will understand and support this map, as well, that right now with the deviation of spread only of 5% this map is a better map and causes less concern for the communities than the map that is currently proposed by the Commission.

Thank you.

CHAIR: Thank you, Ms. Ford.

Does any member of the Commission have a question for Ms. Ford?

M. VAN PERNIS: I have one question. Um…

CHAIR: Mr. Van Pernis.

M. VAN PERNIS: You agree…seeing from your map, as well as the present council district map that you're in agreement that the West Hawaii districts should include the area all the way up to Saddle Road?

B. FORD: Because of the numbers in North and South Kohala, we had to move 20% of something into another district. We chose because of the demographics in the South Kohala area, to move that area into the…what is currently the North Kona, we call it District 8, northwest Hawaii.

M. VAN PERNIS: Well, I notice that…that the Council proposal, the Commission's map and the proposed map runs the Kona, um…your pink district um…line up to the Saddle Road. Am I right?

B. FORD: Yes, we heard from people that they…that they would like to have that and get the military base into District 8 and we took that into consideration, no people there and we did it.

M. VAN PERNIS: Yeah, there's no people there but the watershed in the…you felt …

B. FORD: Yes.

M. VAN PERNIS: …should be in West Hawaii controlled?

B. FORD: Yes.

M. VAN PERNIS: All right, so at least we agree on that point.

B. FORD: Yes.

M. VAN PERNIS: Thank you.

CHAIR: I have a couple of questions. Um…your proposed map divides the Hamakua judicial district, isn't that right?

B. FORD: Yes.

CHAIR: And um…did you solicit any comment from the folks in Hamakua?

B. FORD: All right.

CHAIR: The other thing is that your District 1, the North Hilo District, reading again the letter of November 6 addressed to me, signed by Peter Martin, actually your name doesn't appear on it, but I believe you're aware of it.

B. FORD: That's right, I believe he sent the letter, but I don't feel competent to comment on a letter written by another person.

CHAIR: Let me quote from the letter, then I'll ask you to comment on that. It describes District 1, the North Hilo District and the primarily agricultural rural district consisting of 21% of southern Hamakua, all of the current district of North Hilo, and portions of South Hilo, north of the Saddle/Kaumana Road.

B. FORD; Right.

CHAIR: Its Saddle, Kaumana, Waianuenue, it all the way to the ocean, isn't it? That dividing line.

B. FORD: Yes.

CHAIR: So I'm concerned when its described as a primarily agricultural rural district when I know that...

B. FORD: There's a ....

CHAIR: North of Waianuenue there's a huge apartment district.

B. FORD; Yes, yes, there's a huge suburban area.

CHAIR: All right. Thanks, I just wanted to make sure that we agree on that.

B. FORD: Yes.

CHAIR: I don't have any other question.

Are there any other...

P. KAHAWAIOLA'A: I do, sir.

CHAIR: Mr. Kahawaiola'a.

P. KAHAWAIOLA'A: I only thing, Ms. Ford, that I have is, I think you and I discussed it in Kona. That the numbers you used for your 5% deviation…

B. FORD: Right.

P. KAHAWAIOLA'A: As opposed to the numbers that we used…(INAUDIBLE)..

B. FORD: Right.

P. KAHAWAIOLA'A: …is your numbers still basically….

B. FORD: My numbers are same…and

P. KAHAWAIOLA'A: Can I have that numbers again?

B. FORD: Yes. The gross numbers that we used with the exclusions of the military and the non-resident students are 147, 877. That's 800 people that are legally required to be excluded, and I just need to report to this Commission, I did give a download of a file from the State that has all three exclusions. Unfortunately, it is not convertible to a data spreadsheet, so I've had to re-request that file to be sent down again. When that file comes down, this number of 147, 877 will drop by some number. Now, this map (pointing to map) all the documentation supporting it, including all the census block data, in hard copy forum was submitted to this Commission as part of the official record. And when we get the new file in a convertible form, so that we can redo it, we will redo this map, I'm sorry, not redo the map, we'll redo the database to include all 3 exclusions, and resubmit it to the County.

CHAIR: Okay.

Mr. Ferguson.

J. FERGUSON: Yes, you stated that we are legally required to exclude those people? What law do you….

B. FORD: State law.

J. FERGUSON: State law states that we cannot count those people?

B. FORD: Yes. And in fact, the State Reapportionment Commission just changed their position on that.

J. FERGUSON: That was military, I believe.

B. FORD: It....3 things, military, non-resident military dependents and non-resident students.

CHAIR: Ms. Ford, in your opinion, is the...does the inclusion of those folks change the proportion of the variations so that in any district it exceeds 5% plus or minus?

B. FORD: The sure answer is no.

CHAIR: Thank you.

Any other questions?

Page 84-91:

L. BARTON: I have a motion.

CHAIR: Yes?

L. BARTON: I motion that we um...get the numbers that are on Brenda's and Chucky's map because I think there are a number of issues that are touched on by far too many people and I myself, sitting on this Commission can no longer live with myself, listening to how many people are upset and the overwhelming evidence that ah...although it's not easier for us as a Commission or especially for staff, that I feel we need to have that now.

P. KAHAWAIOLA'A: Um...that's a motion, Mr. Chairman, so I'd like to... because ah...I'd like to second it for a matter of discussion, and I think now would be appropriate for you to have said what you said, Lisa. Reason being, that's what I need to hear, after I heard testimony today.

CHAIR: All right, so there is a second. And the question is now open for discussion.

Mr. Kahawaiola'a.

P. KAHAWAIOLA'A: I would ...now would like to ask the staff, based, just based on this map (pointing to map). If you was to take this map, look at other lines drawn and extrapolate the numbers out of your computer, because I heard Ms. Ford mention that its basically the same software or some kind of, you know, that can be interfaced, or not...couldn't be interfaced, I am now using computer talk, but can you go and take this to a number also, and I think that will satisfy Ms. Barton's motion, so that we can come back, and at the next meeting be able to prepare to do this, or that. Something in that matter, I shouldn't say this or that but at least get some numbers. Right now, we're hearing ...that's my reason for asking, excuse me, Ms. Ford, about the numbers that we use.

CHAIR: Patrick, I believe, Ms. Ford has told us that she provided the numbers, so the numbers are here.

P. KAHAWAIOLA'A: No, I'm...I'm not disputing. You know, I'm just trying to get numbers here...

L. BARTON: I think this is a land description thing...

P. KAHAWAIOLA'A: Yeah.

L. BARTON: And its going to be very time consuming description, um..some of them do follow the same lines and thereabouts, and they won't have that much of a problem. Also they are _____(INAUDIBLE), so I'm....

P. KAHAWAIOLA'A: That's all I would want to ask of the staff for the purposes of discussion.

CHAIR: Let me see if I can um…restate the motion, and with your permission, Ms. Barton, is your motion a request to the staff to produce a map on their equipment with their software that follows the…Ms. Ford's map for lack of a better title. I keep forgetting what it is today, um…and at the same time provided a written legal description that corresponds with that map?

L. BARTON: Yes, I am. The motion is exactly that.

CHAIR: So that's your motion?

Is there a second to that motion?

P. KAHAWAIOLA'A: I would second the motion with the caveat again. I need to go back to the maker of the motion, as you expressed it to provide the legal description, I…that's what is going to be the problem. I would prefer to go and follow Ms. Ford's lines, and go find out what's in the… what's inside the blue, green, and red. And the legal description, I mean, you know, I mean, threats with the lawsuit is a drop in the bucket. I'm just saying if we don't leave the deadline, will then the Court going to come in? I don't know.

L. BARTON: Is the Court going to come in and make a better map anyway?

P. KAHAWAIOLA'A: No, that's my point. That's why I want to address the Counsel. Excuse me the Corporation Counsel.

M. VAN PERNIS: Question. Question.

We certainly shouldn't be operating on the basis of the threats from….

P. KAHAWAIOLA'A: No, no. Mr. Van Pernis, I believe, Mr. Chairman that I have the floor, so that's all I wanted to say. To draw the numbers, bring it back again, and if we don't meet the….I'm….that's what I'm saying, I'm not worried about any threats of a lawsuit, I'm trying to get to

the end of the Commission.. If we don't meet the December 31st deadline does that automatically mean that the Court will do that? Or does it automatically mean that we can go and extend it and get these things done. Again…

M. VAN PERNIS: The Courts will draw a map.

P. KAHAWAIOLA'A: Ah..what?

CHAIR: Excuse me, Mr. Van Pernis. Why don't we let the Corporation Counsel answer that question.

D. AKAMA: I don't know the answer to that.

CHAIR: Okay.

P. KAHAWAIOLA'A: Can you please….I need to know the answer by the next meeting.

L. BARTON: Well, I just want to clarify that the request is not made on the basis of the lawsuit. The question was on something sitting in my mind for a long time.

CHAIR: I appre…

L. BARTON: The last meeting we had, I made the same motion basically, without the land description. I'm just saying, I think we should have done all and we've been putting it off. And I'm just unhappy with myself not having done it sooner, or something like that. Because one out of 9 can't see…that it doesn't have to have a name on the plan. That's all, I'm just looking at logical reasons from within all the people that have voiced their opinion. And actually, it was more so on the guy that came speaking on behalf of Kohala, because…

P. KAHAWAIOLA'A: That's my…

L. BARTON: …because I sat at the meeting and listen to what I thought a majority of people saying Kohala should be stuck…should stay together, whereas, I live in Hamakua and feel very attached to Kohala and the background of the people there, I guess that's where my thoughts were coming from. Sorry.

CHAIR: We're in the mode of discussion now, so, I'd like to ask you a couple questions.

L. BARTON: Yes.

CHAIR: What are the proposals in the map proposed by Ms. Ford, splits the Hamakua judicial district.

L. BARTON: I realize where it splits and I actually like it.

CHAIR: And why is that.

L. BARTON: Well, if I give you my reason, it won't be in accordance to our redistricting. It will be very personal and that is, we have a school district in Laupahoehoe, our boundary ends on the curved bridged. Does everybody know where the curved bridge with the flashing light is...

CHAIR: Ookala.

L. BARTON: ...it's a gulch, called a gulch. Okay. We don't necessarily...ah, always have the population to sustain a school and are threatened quite frequently with ...we've asked the line be moved to incorporate Paauilo, and so bus kids a little further down the road, then they're bussed for about a mile or two. That's not going to change it. These lines won't change that, I don't believe, but that's where, I'm like going. It makes much more sense, that's all.

CHAIR: Let me ask the staff then with regard to the request. Is that feasible, is that possible and in order to meet the deadline, we are going to have one other meeting in which we will, and at that meeting we intend to adopt our final plan. The proposal essentially requires, if adopted, would require the staff to provide us with two alternative plans and we would then be faced with the proposition of adopting one or other. I think you've expressed your opinion with regard to putting together the legal description and the maps incorporating the changes that we've just adopted.

Let me ask you the same question with regard to the plan that's been proposed by Ms. Ford and others. Is it feasible to get those completed before our next meeting and adopt reapportionment plans within out deadline.

P. NAKAMOTO: With the legal description, you're asking?

CHAIR: Yes, with the legal description.

P. NAKAMOTO: We wouldn't be able to get it.

CHAIR: All right. Are there any other questions with regard to the motion?

Hearing none, let me call the question. All those in favor of the motion, signify by saying, aye.

L. BARTON: I wanted to...

P. KAHAWAIOLA'A: I lost tract of the motion.

CHAIR: The motion is...is Ms. Barton's motion. And I believe the motion as restated was that we're instructing the staff to produce maps and the legal descriptions that follow the proposals made by Ms. Ford. Um, so that's the motion before the Commission at this point.

All those in favor of asking the staff to produce those maps and the legal descriptions, signify by saying, aye.

ALL: Aye.

J. FERGUSON: You need hands.

CHAIR: We may.

All those opposed? No?

L. BARTON: Oh, do that one more time.

CHAIR: I think so.

We are going to ask ....

L. BALBERDE: We'll just raise hands then.

CHAIR: All those in favor of the motion, signify by raising your hand? One, two, three, four.

THOSE RAISED IN FAVOR: Jeanne Fuller, Lisa Barton, Pat Kahawaiola'a, J. Fernandez.

THOSE OPPOSED: Jack Ferguson, Mark Van Pernis, L. Balberde.

CHAIR: I have not voted. I will, in defeasance of the staff, vote no. That leaves us tied, Mr. Pavao is not present. Mr. Akama, what do we do now?

D. AKAMA: That means that there's no action, so the motion dies.

A 121

HAWAII COUNTY
REAPPORTIONMENT COMMISSION
25 Aupuni Street, #100
Hilo, Hawaii 96720
Phone: 961 8277
Fax: 961 8673

(Partial Transcript)

LLOYD VAN DE CAR LAWRENCE BALBERDE
Chairman & Presiding Officer STEVEN PAVAO

MARK VAN PERNIS JACK FERGUSON
Vice Chairman JOHN FERNANDEZ
JEANNE FULLER
PATRICK KAHAWAIOLA'A
LISA BARTONTRANSCRIPT OF MEETING
ON
Tuesday, December 18, 2001
10:00 a.m.
at
Hawaii County Office of Liquor Control Conference Room
101 Aupuni Street, Suite #230
Hilo, Hawaii 96720

CALL TO ORDER

The meeting was called to order at 10:06 a.m. by Vice Chair Mark Van Pernis presiding for Chair Lloyd Van de Car who presence was excused. In attendance were as follows:

Patricia Nakamoto, Elections
Gina Haina, Elections
Ed Kozohara, Elections
Al Konishi, County Clerk

Patricia O'Toole, Deputy Corporation Counsel
BrendaLynn Domondon, Commission Secretary

A roll call was taken of the Commissioners in attendance.

Page 9-14:

B. FORD: I brought in...my name is Brenda Ford and I live on 81- 6195 Napoopoo Road, Captain Cook, Hawaii. I'm circulating the final results of the Hawaii County Reapportionment numbers, which ...I hope we're all looking at the same thing. Does everyone have a copy? (A copy is attached as #1)

S. PAVAO: Not yet.

B. FORD: Okay. I'd like to start at the very bottom of this page and kinda work up to the top. If you look at the bottom section, it shows that the U. S. Census gross numbers. These are numbers that the council, I'm sorry, this Commission is using for their numbers. Shows that this Island has 148, 677 people living in the County.

When Charles Flaherty and I turned in our first map on October 18th to this Commission, we had removed the active military and non-resident students which were the only two exclusions that we were able to get from the State which lowered the number to 147,877. We have now received from the State the exclusions for the active military, the non-resident students and the non-resident dependents. So the total...the legally mandated exclusions is 147,806 and that's the number our map is based on at this time. Nothing changed on our map, just the numbers changed. If you go to the center section, you will notice that there are 738 non resident students, 62 active military which you know from previous testimony, those two numbers and the new number is 71 for the non-resident military dependents. Again this did not make any changes

in our map. While most of these numbers come out of the Hilo area, not all of them do, there's a few coming out of the north Puna area, and I mean, very few, less than 10. But most of these are coming out of the Hilo area and you will notice that a number of 871 is a couple of percentage points in the population for a particular district that these would impact. So I would suggest that the numbers you are using again are not legal numbers and you have not reduced the mandetate...mandated exclusions and therefore, your deviations will be off.

The top section of the final numbers for the County using the 147, 806 number, you can see that the allotment per district is 16, 423 and based on that number and the numbers that we have in each one of the areas, based on the exclusions being removed, you can see where our deviation is. We now have a deviation spread of 6% well within the spread of plus or minus 5, for a total of 10%. We are still well within that on the map that we have suggested.

If you have any questions on these numbers, I'll be glad to talk to you about them and answering questions. I am also here when we finish with this one, I have two presentations of two other people.

VICE CHAIR: I note that there is ah...Mr. Boyd who has been signed up (inaudible-speaking away from mike)...is that correct?

B. FORD: That's correct.

VICE CHAIR: Mr. Boyd has testified before and Mr. Boyd's testimony was given in writing as well. So we appreciate that you can testify for Mr. Boyd and you're just going to read his statement, and I point out that we have his statement and it might be part of the record.

B. FORD: I appreciate that you're going to make it a part of your record and I still would like to read it in because that's the request that Mr. Boyd made of me,to read it out loud to this Commission and the public.

VICE CHAIR: All right, please proceed then.

B. FORD: I'll read quickly.

In fact I'll start reading while this is circulating. This is the testimony of Richard Boyd who has requested that I read this into the record. (See Attachment 2 incorporated herein)

(Ms. Ford proceeded to read testimony)

Thank you. Anyone who does not have a copy, I have extras.

VICE CHAIR: I also notice that you have been asked to testify in behalf of Mr. Charles Flaherty.

B. FORD: Yes.

VICE CHAIR: I also want to point out that Mr. Flaherty has testified on several occasions before us so you will read his statement.

B. FORD: I am going to read his statement, I don't have any copies of it, he asked me to read it into the record today and I will leave this copy with this Commission. This statement is written for CERG, Citizens for Equitable and Responsible Government dated December 18, 2001, and it's given to me by Charles Flaherty, to read.

(Ms. Ford proceeded to read testimony, see Attachment 3 incorporated herein).

It is signed by Peter Martin, Sandra Scarr, Stan Boren, David Holzman, Charles Flaherty and Betty Meyerson, all on the Steering Committee of CERG. I guess I

...(INAUDIBLE-SPEAKING AWAY FROM MIKE)....give it to you or....

VICE CHAIR: Thank you, Ms. Ford. Are you finished?

B. FORED: I have one other statement. This is in response to the comment you made at the beginning about the one map that was designed by this Commission that had an urban Kailua district and your persistent comments about how similar that map is to the one that being supported by CERG. While it is true that the CERG map is supporting an urban Kailua-Kona district, the east side of the CERG map bears no relationship to the illegal drawing of 4 districts controlled by Hilo that this Commission is supporting. One more time I'm telling you that you do not have the legal population to support 4 Hilo controlled districts. What you're doing is wrong. I urge you to change this map or adopt the CERG map which shows the legally allowed limit of 3 Hilo controlled districts. Thank you.

VICE CHAIR; Any questions of Ms. Ford? I have one.

What 4 districts on the map, you are saying are controlled by Hilo?

B. FORD: The....your number 1. Your section number 1, like ours is the North Hilo suburban area and the rural areas of Hamakua, your district 2, 3, and 4 and you will notice if you compare that to the CERG map that you do not need districts 2, 3 and 4. You need just 2 districts in that area and North Puna is entirely deserving and has the population to justify its own council member. You have ripped apart North Puna into 1, 2, 3 different districts in order to keep 4 districts controlled by Hilo.

VICE CHAIR: Are you saying then that the District 1 that goes... (inaudible)...to Honokaa to Waipio Valley is controlled by Hilo?

B. FORD: Yes, you have a large suburban population there that is controlling that district.

VICE CHAIR; Thank you.

Page 16- 17:

B. JACOBSON: Good morning, folks. Thanks for having me again and I won't try to be repetitive, so I'll take that to heart certainly. Unfortunately, there was some certain repetition that's been going on at each of these meetings and its been said that all plans....well, I mean, all the plans have merit, I would just say your plan has very little merit compared to the CERG plan. Secondly, I'm sort of concerned, I look at this today and there's no numbers on the plan where they just compare the numbers of population....

VICE CHAIR; Does that mean the percentage from the ideal?

B. JACOBSON: Yeah, I don't see that in today's hand out at all.

J. FULLER: It's the last page.

(INAUDIBLE-PEOPLE SPEAK SIMULTANEOUSLY)

S. PAVAO: Maybe they don't have that page.

B. JACOBSON: Well, they're not available to the public today evidently.

VICE CHAIR: I'm sure its available from the staff.

B. JACOBSON: Well, before everybody testified, it certainly wasn't cause I, again I don't have it here and I got it on time, so. Ah...one more thing...I just have to give you the opinion that the CERG plan certainly does not resemble any of your plans other than what Brenda pointed out that the central Kailua urban district is on one of the earlier plans but again the way they handle Puna so separately despite the fact that we have adequate numbers of people to justify two legal council members to Puna, that has being denied. So I think that is unfair and I think you all know how I feel. Thank you.

VICE CHAIR: Any questions of Mr. Jacobson? Now I call upon Julie Jacobson.

Page 17-27:

Again, we've heard from Ms. Jacobson several times so I hope we can avoid repetition.

J. JACOBSON: Aloha, thank you all for being here. I think a special thank you to, I wasn't at the last meeting but to those of you courageous enough to vote to take a good look at the CERG map at the last meeting. I really thought that was impressive, that 4 of you actually see that so I think that shows that there is certainly quite a bit of dissatisfaction with the map you proposed, so I just start with the fact that I consider your proposal flawed in so many ways that I think you need to just throw it out and start over again and I think the best place to start over again is with the CERG map and I think they did a good job at looking at the needs and analyzing it and seeing the big picture. So that's my basic recommendation to....you have the chance right today to do the right thing. And that would be to reject this map and put the CERG map before you and develop a map if not identical but with the basic main features that they have suggested for that map.

And the other thing I'd like to start out with is that its just very disheartening to me, having gone through this whole process and attended almost all of the meetings, the last one we had a Council meeting which certainly was my first priority to attend to my attend to my Council business, but that each of them, just today for example, the process begins with Mr. Van Pernis from the chair making an opinion which is generally not the appropriate way according to the Roberts Rules of Order to comment from the chair about the article in the paper about Kohala. That certainly shows the bias going into it, this is the section where you hear from the public.

Um... and the second thing is that along...I mean the process, still to this day, you have not had maps that the public can understand available to us at all. I basically had to have the kindness of the press to let me look at theirs and coming into the kindness of the council staff to let me, excuse me I mean the Elections staff to let me come and look at their maps but your actions have not provided adequate information ever throughout this process. And the most recent example of it, you know I provided you with a very crudely made map with cross references that could show the different districts, but your map to this very day that you pass out, you cannot distinquish the lines between two and three on your insert map. And just you just learned just now you did not have the percentages, so the process continues to be flawed, in terms of basic Sunshine rights to have information before the meeting and to be able to study and react and provide input ahead of time. That's never been able to be done on this and um...ah, and then to the basic issues here, and again why I am even telling you we shouldn't be repetitive.

Well, I just want to remind you that it was Mr....it was your Chairman Mr. Van de Car that specifically told me if my

plans were to be...if my proposal were to be considered, well, what I needed to to do was to go to each meeting and present it. So I was told to do that by you, and so I consider it, you know, adversarial for you to start your meeting with the statement that we should not be repetitive when your Chairman directed me to do that. And to the idea that you have considered, you said 11 maps, well, the fact of the matter is we made request to you to actually have the staff draw them up and you have consistently refused to do that, although the 4 of you think you did ask for that at your last meeting. But to summarize that you did that is an incorrect statement. You will with a tie vote you were able to reject doing that process. So its not as though you have given them consideration, you haven't given that map equal consideration because you haven't done the technical work to give it the consideration its due.

Ah...and then now I'm going to go into the Puna problem which started me with this in the first place. As you know, you are both fracturing and packing districts. And as I said before the irony is that the district you packed for me is...increases my likelihood of getting elected in terms of the results of the last two elections and analyzing the precinct data. So I suppose I should be saying thank you but to me justice is more important. By, you know, if I get by a car today, I want to know if I did the right thing and stood for justice no matter what it does for my political chances. Um...and then so you packed it and then in terms of the political encumbrance. So I believe you generally have done that for other districts although I don't know the specifics of the precinct voting patterns. But more, even more critical to me is the fact that you fractured the Puna community and you have basically put Puna people in one controlled by the Hilo districts. To debate what is controlled by...the very process that the State rejected canoe districts based on the idea that that areas are very

different, Maui and the Puna areas and Hilo, and they realize that they had the majority of the population on the Maui side and I believe that's on the Maui side I think was 58%, they realize that that was not allowing for proper representation, that would be too much of the borders would be in one area and not the other And so that's what you're doing with your arrangement with 3 and 6. You are splitting...and I just want to remid you that the Puna district border with Hilo is roughly near...its roughly near the 5 mile marker near Macadamia Road on the highway.

So your map draws the 3 and 6 lines way up on the Kulani Road on the makai side of the highway. And Peck Road, Peck Road in on the 16th mile marker you have 10 miles of Puna along the highway in on the mauka side, and there are many subdivisions in that area. There are many people that are affected by this. You have fractured the town of Mt. View. You have Mt. View School in the 6th District on the makai side of the highway and just a few hundred feet up the road, you have Mt. View Post Office in the 3rd District because its still Hilo side of Peck Road. So you have split the town of Mt. View, having the Post Office a few hundred feet from the school and in different districts is just wrong, this town is fractured.

And then I come to the point that I made earlier that I don't think you ever addressed, and that is this whole issue of the fact the way the resources and the way County government is currently organized is around judicial districts, the State judicial districts, our fuel taxes are led by that, our figures on property tax are described in terms of the judicial districts. Our Parks and Recs are organized by it, and our Public Works Department. And so this is....so when you make them drastically different from those, I mean you have the population range of 17 some hundred people to 47 hundred some people. So each district of course is going to

be one but to the extent that you can not divide them up, not throw 3 different districts and not mix them up like this, you would be able to do a better job of keeping tract of recourses and insuring the equity of the resource dispersal. Um...and....I guess these are just my main points and then, of course, the same factor that you have never address the length of the 6th District, and you've also created a kind of interesting phenomenon that you might not think about that you can say that it is technically contiguous, all the way down to Kealakekua Bay, all the way up to the back corner of Hawaiian Acres on the 9 and G road. But in order to travel on a paved road, you know, and not take another extra hour of travel time bouncing around on the back roads, you have to leave the district in the Hawaiian Acres end at about the 10 mile marker and drive almost 6 miles...well, around between 11 and 10 and 11, and up the other one at 15 and 16, but you have to drive 5 miles on...to drive on pavement you have to drive 5 miles outside of the district to get back into it again at the one end. So if you flew by magic carpet, I guess that's contiguous, but if you travel by road, you have to go out of the district and back in it again. And you may have a few spots where you have to do that for a short distance. But you don't have anything glaringly like that, like you do in the 6th District. And so I just urge you to do the right thing because it is just a foregoing conclusion, you will face this in court and I think that as Brenda has pointed out, it is just a terrible waste of taxpayers money and a terrible distrust you give to the public when, you know, we all know that the vast majority of the public had told you this plan doesn't work, and the vast majority of us have come together on another plan, and you know, that's what 90 some per cent of the public has told you particularly interestingly the public that comes here in person to tell you this. The public that goes to every meeting and tells everybody what they think out front, that

part of the public is here, and has been here. The public that you get letters from that you read their written testimony, you know, maybe some of you have said, well, there's a whole bunch of that, and I suppose we can go and look at your minutes and try to sort out well, just how much of that is there compared to this. But in terms of your meetings and the process where we worked ostensibly supposed to present our testimony, its been clear and decisive. And so again, I urge you to just do the right thing today, its not too late and each of you have the intelligence and if you, and I think if you listened to the real reason behind all of this, you'd see that that what you're doing is against the public interest and it's a very deep and disturbing thing to....to prevent justice that will affect us for 10 years. And its very hard to, just as I thought we did it wrong the first time in 1992, and all we're doing is exasperating that and its very hard to change tract so if we have to have another ten years of this wrong what's made worst than what we what we already have, you know you are really undermining the public trust, the public confidence in government, and we certainly don't need that with the scarce resources and the difficult problems we have all the way up to the international level . Its time to...if you want to show solidarity with the people of your island you know what to do, and that is to reject this plan and to create a plan, if not identical to largely similar to the CERG plan the Hawaii Constitutional plan.

Thank you very much.

VICE CHAIR: Any questions for Ms. Jacobson?

S. PAVAO: I have.

VICE CHAIR: Mr. Pavao?

S. PAVAO: This is a point of clarification, Ms. Jacobson. I heard you say something, and I want to make sure that I

heard the right thing, but are you saying that 7 to 10 people testified at the public hearing is the vast majority? I heard you say that we heard from the vast majority of the public and the vast majority of the residents of this island.

J. JACOBSON: No, I didn't say that the vast majority actually came to the meetings, I'm saying in the meetings. For example I think the most notable one is the Puna meeting, where 26 people testified...in fact I don't think we were looking at the CERG plan but it's a plan that my husband and I proposed, and that was...actually what I remember is that even no one that I've heard from the public came out and said: we love this plan, let's do it. The most that I've heard was, even this, the majority of the people saying was presently seated council members saying: we can kinda live with it, we trust you doing a good job, we support what you're doing. And then some of you of the public who were not council members said: well, take a good look and you're looking at this and then some council members to their public testimony to you did not take a specific position.

S. PAVAO: Wouldn't you....

J. JACOBSON: And that's what I call that when you have um..in terms of the people who came to speak here, I call that the vast majority...even with the people who came to....

S. PAVAO: Wouldn't you...

J. JACOBSON: ...even with the people who came to....

S. PAVAO: When you say its true that you know, in Puna mauka and Puna makai you did numbers with 30,000 people and 26 people speaking at a public hearing still is not indicative of the vast majority of the residents of the district.

J. JACOBSON: I'm saying that the conclusion you should draw, the public testimony you got leads you to this being what the people supported. The only way I would back out from that is if you....excuse me, what am I...those people should have come who don't approve of it, and I don't know why you have to cut...why you have to think you have to wonder about what people ah...people could've come to all these meetings, people could've read all of this.

S. PAVAO: Well, I don't think the issue is wondering what the other people are saying or not, we all live in districts, we all talk to people in our districts day in and day out and they have different opinions as opposed to just hearing from public hearings we have input from other areas as well.

J. JACOBSON: Ah yes, and I would assume that they should be on the record and...

M. VAN PERNIS: I think we covered the subject.

J. JACOBSON: And I'd like to say this, but there's literally hundreds of people...

M. VAN PERNIS: Excuse me, we have a question pending. Ms. Jacobson.

J. JACOBSON: ...who have told me that they don't like the plan....

M. VAN PERNIS: Ms. Jacobson, please. We have a question pending.

Any more questions from the Council...excuse me, the Commission?

L. BARTON: I have.

M. VAN PERNIS: A statement or question?

L. BARTON: A statement to what she's saying.

Clearly, I just want to say that this morning when you said, "a lot of people have come out", I do agree. A lot of people have come out in support of our plans, and they also have to say that its been my experience, and I think you may be aware of this that on this Island is, when you have the meetings those that don't come are basically saying, they're not...there's not enough interest, they're not opposed, because when they're opposed, that's when they come. That's all I wanted to say, and so as far as support for the plans, it's the lack of support we are hearing of the plan right now. The majority of not supporting is staying at home and saying and saying: whatever that's fine.

J. JACOBSON: But I want to comment that you cannot make the leap that the majority are staying home, has studied the issues, knows about it, has an opinion about it.

M. VAN PERNIS: As I understand it, you are now in favor of the CERG plan and are basically not advocating the plan that you and your husband submitted earlier in the proceedings?

J. JACOBSON: I'm supporting the CERG plan. There may be details where one plan has some benefits and another plan has some benefits, to summarize that I think particularly for the Kona area, I did not consider that I have the expertise, and I'm sure theirs is vastly improved in terms of their intimate knowledge of that area.

M. VAN PERNIS: So we should take your testimony in supporting the CERG plan...

J. JACOBSON: Yeah.

M. VAN PERNIS: ...and basically the drawing that you are...the earlier plan that you and your husband submitted.

J. JACOBSON: Well, that's not the issue to me to withdraw. I gave you the proposals. Now my point is that their plan is a desirable plan, a very good plan, and I support it.

M. VAN PERNIS: Thank you.

Any more questions of Ms. Jacobson? Hearing none, I'll next call Mr. Mikahala Roy, please.

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A. KONISHI: Good morning, Mr. Chairman, good morning. Commissioners. For the record, my name is Al Konishi, and I have spoken to you before. For those in the audience, I would say this again.

Just for...to disclose where I am coming from, I am a political appointee appointed by the Council members. Having said that, yeah, I also want to say that according to the Charter, my role is to provide you with logistical support and as you know, as a political appointee, one of the things that I have done is, I have gotten out of the way and made sure that myself and the other political appointee of the department, Mr. Ikeda, we have had nothing to do with the drawings of the line. In fact we kind of banned ourselves from the room where Mrs. Nakamoto and Mr. Kozohara are doing the lines. I just want to say that just to clarify that for the record. Having said that, you know, I hate to be the bearer of bad news, okay. But this morning I had a chance to check with Mayor Kim outside his office, and we were just shooting the breeze, and we talked about the concept of telling it like it is even though it is not popular. So I'm sorry to disappoint a lot of people in the room but as a person providing you with logistical support I gotta give you some bad news.

First of all, the deadline that's imposed on you is December 31st, that's 13 days away. That's is not a deadline that I

made, its not a deadline that staff made, its not a deadline the HGEA made, the Council or the Mayor. This is a deadline that the people of this Island voted for on...in November of 1990. This deadline has been known, therefore for 11 years, from November 1990 to now. This December 31st deadline is known.

Second thing. This deadline is not a matter of convenience for the staff or for myself or the candidates. State Law which no one in the County has the authority to supercede. It says that Mrs. Nakamoto and her staff have to have maps, descriptions, nomination papers available for candidates in February. Okay?

Here's the bad news. If you make any major changes to this map that is behind you, they are not going to make the deadline. Now I'm not here to ask for your sympathy, but we have our workers working an average of 14 hours a day. They simply cannot put more hours in the day and make this deadline. They simply can't. In fact, Mrs. Nakamoto quite does not want me to reveal this. But we are in a situation now where we can't finish it without her, she's facing a situation where she's going to lose accumulated vacation time because we just don't have enough time to do anything else. So today is, I know I heard a very, very nice presentation by the previous speaker about delaying...I'm sorry, I gotta break the bad news to you. We can't do it. If you're going to make the deadline of December 31st, you gotta go today. And you know, again, I just want to also state something for the record, because I heard Mrs. Ford mention this and I read it in the article.

Just for the record, folks, you know, a lot has been said about what is Constitutional and what is not. And Mr. Ferguson, Mr. Van Pernis are legally trained. Burns vs. Gill is not the controlling authority in this Reapportionment

situation. Burns vs. Gill was decided in 1970. I am only saying this because, you know, I want to reassure you Commissioners. Burns vs. Gill was decided in 1970, the issues it had were whether or not State legislative districts would cross over the water. Also, they talked about the issue of multi-member districts. In Burns vs. Gill , the Hawaii Court...oh, I'm sorry./..the U. S. District Court I believe talked about the history of Reapportionment in Hawaii. In the recitation of the history, they talked about how a committee of the Constitutional Convention went ahead and did their reapportionment plan. And in that recitation they mentioned the factors that, that particular committee used. Now, Mr. Van Pernis and Mr. Ferguson know that a holding by the Court, in other words, its something that is put right to the Court, the question is, you know, can they do this or can't they. That is the ruling in the court, in the case Burns vs. Gill does not stand for the proposition which I've heard them alluded to. I think, in my opinion, the controlling authority is the case of Kawamoto vs Okata which took place in 1994 in which residents in Waipahu were upset because they said their district was cut into three different pieces. Now, that's not what's quite on point, but I think that would have more authority than Burns vs. Gill. In fact, there are two excellent articles on reapportionment in Hawaii. One being called The History of ReApportionment in Hawaii, the other one is How to Challenge a Plan or How to make a Plan. One appears in the Hawaii Bar Journal and one appears in the University of Hawaii log. Burns vs. Gill is hardly cited. Okay.

I just wanted to mentioned that in case some of you wondered whether or not there are constitutional questions about the particular plans that you worked on. Again, you know, as a political appointee, I don't want to get into the specific plans as to whether or not, I think they are

constitutional. I just wanted to make that clarification that and you could, you know, if you want to consult with your attorney, you can do that, too. But in my opinion, Burns vs. Gill is not controlling, its Kawamoto vs. Okata. Anyway, I am sure, you know, again in keeping my effort to keep this apolitical, I'm gonna leave the room after having stating this. We have excellent staff people, on the question of integrity etc, they can fill you in more about some other columns they would have if you made any major changes to this map here. Again, I want to make it clear. Its not because I am supporting this map, whatever map you have behind you today, what I'm telling you is, if you make major changes, whether it may be the CERG map, Mrs. Jacobson's map, maps 1-9, you make major changes today, you're gonna have a very difficult time making a December 31st deadline. And again, that's not a matter of convenience for us. Its State Law and it's the County Charter.

S. PAVAO: May I ask Mr. Konishi a question?

VICE CHAIR: Any other questions Commissioners have for Mr. Konishi?

S. PAVAO: Can you briefly tell us what are the Court's fiindings in Kawamoto vs. Okata?

KONISHI: Okay, in Kawamoto vs. Okata, Calvin Kawamoto who was then the head of the Neighborhood Board, now he is a State Senator, said that Waipahu had been split up and it was discriminatory, violated the people's equal protection rights, etc, etc. Now what the Court did there, the Hawaii Supreme Court, is what most Courts do, in gerrymandering...alleged gerrymandering cases. Most times, unless a Commission had done

something so outrageous, they would not get involved, because Courts don't like to draw lines. Okay. So they have looked at the first issue. They said are there huge population deviations? Okay, and the answer was no. So therefore... then the Courts said, okay, if you're basically saying that the people of Waipahu formed this group that is somehow getting their rights discriminated against, so they broke it down a couple of ways.

The first point was is there an identifiable group? And the feeling of the Court was, Waipahu is so diverse in ethnicity, in socio-economics, in occupations, that it is so nebulous, that what group are you discriminating against? And the Court noted that most times on the mainland, where people allege discrimination, is basically racial discrimination, and those things are readily identifiable. Okay. But in the case of Waipahu, Calvin Kawamoto was just saying, well, we don't like the fact where they split up three different ways. Also, the Court then said, what is Waipahu? You know. Where does Waipahu begin and end. What about just about got this case memorized. What about Village Park? What about SeaView? What about the community of Waipio? Okay, so the Court say, gee, Cal you can't even show us on the map where Waipahu is. Okay.

And I...I can't remember the last point but so what the Court did was found that the City and County Reapportionment Plan was valid, it was not...it did not constitute gerrymandering, and it did not discriminate against any so-call unidentifiable socioeconomic group.

Again, you know, Mr. Pavao, if you're kinda interested, there are some excellent law review articles on the subject, they are kinda understandable, even though they are drafted by lawyers. Usually I don't recommend yhings....or lawyer's right but just basically just what they decide in Kawamoto.

S. PAVAO: Thank you.

VICE CHAIR; Any more questions of Mr....?

P. KAHAWAIOLA'A: I do. And my only question to Mr. Konishi, is what's the bad news? So what's the bad news, you came in with some news. What's the bad news? I guess, you're giving me the idea that we knew the deadline was ....

A. KONISHI: No. I know....

P. KAHAWAIOLA'A: ...the 31ST of December, so I mean, I just hope that...and I only speak for myself, I just hope that ah...I knew the deadline was there, I know the crunch time, and the knew the staff had...I'm not going to put....be prepared to put the staff under that kind of situation. If someone's going to lose big time, and they're working 14 hours, and don't get so see, you know, their families during the holidays, by the same token, that's why I'm saying, that in my opinion, there's no bad news. We're prepared, you know, we gotta do what we gotta do, we took it on and ah...or I took on this job...ah assignment to do this till December and make sure that ah..we can come and constitutionally say, you know, the threat was there, and the threat is still there. I heard it twice tonight...today, that it may be resolved in the Courtroom. So be it. If that's the way its going to be done, this is supposedly, this is America, and that's the Constitution that they prepared to, to, to use, and I heard the 14 Amendments and I put a record, and I'll make it clear for the record, as a native Hawaiian living on Hawaiian Home Lands, the 14th Amendment does not apply to the Hawaiian Homes Commission Act. I can make that categoric and clear. It does not apply to the native Hawaiians that live... that are living under, that are qualified under the Hawaiian Homes Commission

Act. That's a sad case to mention, but its...its clear in this County, so I don't want to start that...go into that tangent, however, I am prepared just to do what is fair for the rest of them because not all of my ohana, my family, qualifies as native Hawaiians, and therefore, they live in separate parts of this Island. So I just needed to make it clear, I just thought it as a matter of ah...to break this seriousness that you have. I didn't hear any bad news, I just heard that we just have to keep it going.

A. KONISHI: Well, you know, I want to thank you, thank you, Patrick. I just want to review another conflict I have, Patrick and Mr. Balberde. No, I don't have a prejudice towards Keaukaha so I'll reveal that for everyone now. I say that because I know a lot of, you know, people are not happy in the room, and a lot of statements have been made but the reason I said bad news is because at that other meeting, I want to point out that yourself, from East Hawaii, from Keaukaha, the great community of Keaukaha, Mr. Balberde from Waiakea, Ms. Barton from the eastern side. You guys were the ones who voted to take a look at the CERG map. So when I say bad news, I know you guys did your best to try to get their concerns out, you guys didn't have the votes. And when I tell you because of that track record of being open like that, I just wanted to tell you that even if you wanted to look at it at this point, I'm sorry, its just too late. So again, because you guys had voted for that CERG thing the last time, I just wanted to throw that out for you.

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J. FERGUSON: ... I feel that what we have done here is nothing unconstitutional, as I said, people may differ. They feel differently about what we have done, and they have their options and I encourage them to use them. Not just for the sake of saying, gee, we lost, lets go to court, but because

you truly believe in what you're doing. I don't think that there's anyone, anyone who is proposing these different plans in what we have talked about here on the Commission, has any particular political agenda in mind, I think most of these people believe that their idea is better than ours. And they're certainly entitled to that opinion. I would like to state for the record, that I personally did consider all the maps that we presented including the CERG map and Ms. Jacobson's map, and I know that the other Commissioners did, too. They were discussed here at the meetings and we did hear all of your arguments, you were not shut out, we listened to whatever you had to say, we just don't agree.

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VICE CHAIR: So then the motion will be so amended. Is there any further discussion? ...

VICE CHAIR: All right, I would then ask that all those in favor of the proposed...excuse me... All those in favor of the 2001 Council District Plan as presented in Mr. Pavao's motion, please raise their hand.

ALL HANDS RAISED.

I note the unanimous 8 votes. Mr. Van de Car, of course, being absent.

Thus the plan and the motion passes, and the plan is in effect.

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United States Election Project

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Enhancing Competitiveness in Redistricting

(Partial Text)

One of the fundamental characteristics of democratic government is that voters have a meaningful choice among candidates on the ballot. The 2002 congressional election sorely tested the degree of democracy in the United States. Pundits widely reported the 2002 congressional elections as the least competitive in modern history. Only 40 – plus or minus a few – out of 435 House races were considered close enough going into election night that the outcome was not known with a high degree of certainty.

How can the country regarded as leader of the free world host legislative elections whose competitiveness is nearly on par with one-political party dictatorships such as Cuba, old Iraq, Libya, and the old Soviet Union? The answer lies in how the districts are drawn. Districts are redrawn every ten years in a process known as redistricting. Only in the United States do the politicians have so much say in how their districts will look. Democracy is turned on its head during redistricting – instead of the voters choosing the representatives, the representatives choose the voters. Naturally, they choose voters that will further their political goals, not enhance democracy.

How to create competitive districts? To answer this question, the goals of those drawing the districts are examined here so that their motivations may be understood, and why they prefer to create non-competitive districts. The genius of the federal system of the United States has produced multiple redistricting criteria and processes across the fifty states, and thereby provides examples of what does and does not work to enhance competitiveness in redistricting. These are broadly defined into: redistricting criteria, redistricting procedures, and electoral procedures. Each item within these categories is briefly described below, including a discussion of its effect on competitiveness and prospects for reform.

Overall Recommendations for a Commission System

A proposed redistricting process that will produce competitive elections is a commission system. These recommendations are based on the Arizona commission model, with lessons drawn from elsewhere...

3. The selection procedure should insulate members from political influence, while at the same time providing for partisan representation on the commission. Members should not be allowed to run for election in the districts they create...

8. The commission should have a competitiveness requirement in drawing districts, as so much as that requirement does not conflict with other legitimate goals of redistricting, such as population equality, adhering to the Voting Rights Act, etc...

9. The commission should not be allowed to know the location of incumbent homes when drawing districts. Information regarding partisan voting is necessary, however, in order to gauge the competitiveness of districts...

What is Gerrymandering ?

A special word has been devised to describe manipulating district boundaries to affect a political outcome - gerrymandering - in dubious honor of a state legislative district proposed by Massachusetts Gov. Elbridge Gerry in 1812 that bore a striking resemblance to a salamander. Redistricting affects the careers of politicians and the representation of political parties and racial groups. Incumbents, political parties, and racial groups all have a role in the redistricting process, so understanding the motivations of these players and how their motivations interact with one another is important to understanding how the redistricting process operates in practice and shapes outcomes.

The three types of gerrymanders are:

- Partisan gerrymandering: The goal of a partisan gerrymander is to gain partisan advantage through redistricting. Partisan gerrymanders occur when one political party controls the entire redistricting process. For a state legislature, the goal of a partisan gerrymander may be to secure majority control, while for congressional districts, it may be to maximize the number of seats a party will win in a state. These two goals are subtly different, but have generally the same effect on redistricting.

The strategy behind the ideal partisan gerrymander is to "pack" and "crack" supporters of the opposing political party. Opposition supporters are "packed" into extremely safe districts in order to waste their votes in pre-determined elections. The gerrymandering party efficiently distributes their supporters across the remaining districts, placing just enough in each district to comfortably win, but without stacking itself. Opposition party supporters are "cracked" across these districts, wasting their votes in elections that their party's candidate cannot win.

Districts created in a partisan gerrymander tend to be non-competitive. The opposition party's districts will tend to be extremely safe while ironically the gerrymandering party's districts are a little less so, so that their supporters may be more efficiently distributed throughout a jurisdiction. Sometimes the practicalities of the political geography of a state will limit the partisan gerrymander, enabling the creation of a few competitive districts currently represented by the opposition party that the gerrymandering party hopes to pick up in the following elections.

- Incumbent protection gerrymandering: The goal of an incumbent protection gerrymander is to secure reelection for incumbents. Often this form of gerrymander represents a compromise between the two political parties, a situation which is forced when one party does not exclusively control the redistricting process.

Redistricting is one of the few political processes that lends itself to bipartisan compromise. Two representatives from different parties, whose districts adjoin, are willing to make mutually beneficial trades. A Democrat representative is willing to swap with a Republican representative, Republican voters for Democratic voters. Both representatives gain electoral security through this trade. Incumbent protection gerrymanders tend to produce the least competitive elections.

Racial gerrymandering: The goal of racial gerrymandering is to secure the election of candidates of choice of a particular race...

None of these three types of gerrymanders results in competitive districts. Incumbents prefer a certain and decisive win, not only to retain their job, but also to frighten off future challengers. Political parties prefer certain

victory to the possibility that the other party will win elections. Racial groups prefer their candidates win with certainty, rather than the chance that they will lose. As these interests often have control over redistricting at some point in the process, the deck is stacked against the creation of competitive districts...

Enhancing Competitiveness in Redistricting...

Redistricting Criteria...

2. Compactness

Description: Compactness is another generally accepted criteria for redistricting that is often encoded into state constitutions. Together with contiguity, compactness reflects the notion that districts should be composed of a tightly defined area so that representatives may be able to more efficiently communicate with their constituents. "Bizarrely" (in the words of Justice O'Conner) shaped districts are an indicator of political intent in redistricting, as political concerns are most visible in districts that incorporate within their boundaries certain areas over others. The reverse is not necessarily true, as a compact district may still be cleverly drawn to affect a political end...

The U.S. Supreme Court (see Bush v Vera) and state Supreme Courts have considered compactness measures in deliberating the shape of districts, but have not officially adopted a measure, relying instead on "eye-balling" of districts to identify non-compact districts.

Competitiveness Effect: The effect of a compactness standard is dependent on the political geography of a jurisdiction. If voters in a jurisdiction are neatly distributed into communities from which compact districts may be drawn around, a compactness standard may decrease competitiveness. If the political landscape is a heterogeneous patchwork of disparate political

communities, then forcing the combination of communities would likely lead to more competitive elections. It is possible that non-compact districts could achieve the desired mixing of political interests, too. Furthermore, compactness is not a panacea, since cleverly drawn compact districts may still be non-competitive.

Prospects for Reform: The devil is in the details. Compactness has multiple definitions, so one would have to be chosen, and it has detrimental effects on other redistricting criteria (e.g., respecting communities of interest and the Voting Rights Act.). Even so, many states explicitly require districts to be compact without specifying a standard.

3. Respect for Communities of Interest/Existing Political and Geographical Boundaries

Description: The requirement that district boundaries follow existing political or geographical lines, or respect identified communities of interest, is sometimes found in state constitutions. These requirements address the heart of the concept that contiguity and compactness together hope to accomplish: basing districts on communities with a shared interest. These are typically separated into two separate criteria, one regarding respect for existing boundaries, and another respecting communities of interest. The former are easy to identify on a map, the latter require states to hold citizen meetings in locations across a jurisdiction in order to determine where communities of interest exist. Sometimes communities of interest correspond to existing boundaries, but this is not always the case as communities of interest may sometimes be bounded by something as mundane as a road.

Competitiveness Effect: Communities of interest are by definition, communities with a shared common interest, and as such tend to be politically homogenous.

Competitiveness requires a mixture of interests to spark debate and exchange of ideas during political campaigns. District boundaries that separate communities based on their shared interest tend to reduce competitiveness.

Prospects for Reform: In Miller v Johnson, the U.S. Supreme Court identified respect for communities of interest as a legitimate goal of redistricting. The criterion is also codified into some state constitutions...

5. Equal Population

Description: The United States Supreme Court ruled in Reynolds v Sims and Wesberry v Sanders that state legislative and congressional districts must be of equal population size.

In subsequence rulings, (such as Karcher v Daggett) the Supreme Court has ruled that congressional districts must have perfect equality of population; though small deviations have been allowed in some states if there is a compelling state interest, for example in 1991 Texas had a 0.82% deviation in its 1991 map that was upheld by the courts while a Kansas plan with 0.92% was rejected.

For state legislative districts, the United States Supreme Court has generally allowed larger deviations, upwards to 10%, from the smallest to the largest district; larger deviations are permissible if a jurisdiction can again prove a compelling state interest to do so. Some state constitutions have specific equal population clauses in their constitutions, and State Supreme Courts may interpret the state constitution to require less than a 10% deviation. For example, the Illinois Supreme Court has interpreted that state's constitution to require a 1% population deviation for state legislative districts.

Competitiveness Effect: Initially, the equal population mandate perhaps did more to increase competitiveness than any change in electoral laws in the history of the

United States. Prior to equal population requirements, some states had not redistricted for 60 years or more, creating a "creeping" gerrymander that favored interests representing politically homogenous rural districts.

An unintended consequence of the equal population mandate is that redistricting now must occur at the beginning of each decade with the release of a new census of population. As redistricting tools have become increasingly sophisticated, those in control of redistricting have been able to manipulate the process to produce uncompetitive districts.

Prospects for Reform: None at the Federal level. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment as providing the guarantee of equal population districts.

State constitutions could be changed to increase equal population with regards to state and local redistricting, but it is not clear what the effect would be on competitiveness. Population equality constrains gerrymandering, since there are fewer maps that can be created with equal population. However, there may exist maps with sizable population deviation that are more competitive than any map with zero population deviation. Given the uncertain impact on competitiveness, a strict equal population clause should be omitted from a state constitution in order to allow small flexibility in enhancing competitiveness in districts and other redistricting goals (e.g., incorporating an entire city within a district that otherwise would require a split of that city – a split that would likely be made along political considerations).

7. Incumbent and Partisan Blind Redistricting

Description: Incumbent and partisan blind redistricting criteria seek to remove political considerations from redistricting. In the case of incumbent-blind redistricting,

those drawing the maps cannot know the location of incumbent's homes. There are two sorts of methods to require partisan-blind redistricting, either through limiting the use of election information in the course of redistricting, or through language that states that redistricting should not be used to favor one party over another.

Competitiveness Effect: Incumbent and partisan blind redistricting criteria improve competitiveness by limiting these two powerful interests – incumbent and partisan – both of which prefer safe districts.

Limiting the use of election data during redistricting, however, may have a negative effect on competitiveness, since these election data are necessary to determine the competitiveness of a district, and how to improve that competitiveness.

Prospects for Reform: The U.S. Supreme Court has implicitly acknowledged that incumbency and partisanship are legitimate goals of the redistricting process, though the court has ruled in Davis v Bandermere that there is a limit to partisan gerrymandering (though the court has only once overturned a plan based on partisan gerrymandering, and that plan regarded at-large districts versus a districting system in North Carolina). There is much speculation regarding Vieth, the most recent partisan gerrymandering case yet to be decided by the Supreme Court. However, the Court has never ruled that limiting these interests in the course of redistricting is unconstitutional, and indeed, some states have adopted such redistricting criteria.

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REDISTRICTING CRITERIA FOR HAWAI'I COUNTY

By Charles Flaherty and Brenda Ford

1. No district shall be drawn to unduly favor or penalize a person, political faction, or incumbent.
2. Districts shall be drawn that are as compact as practicable using current computer technology.
3. All parts of the district shall be contiguous to the district. A resident shall not be forced to leave the district in order to reach another part of the same district.
4. District lines shall, where possible, follow permanent and easily recognizable features.
5. Nonresident military, nonresident military dependents, and nonresident students shall be excluded from the permanent population base used for calculating "ideal" district numbers and deviations.
6. Districts shall have approximately equal, permanent, resident populations, as required by applicable constitutional provisions.
7. The total deviation for the entire redistricting plan shall be less than 10%.
8. The maximum deviation within a district shall not exceed plus or minus 4.99% of the ideal district population. An ideal district population shall be the total number of permanent residents divided by the number of Council Districts.
9. The "one person, one vote" principle shall be used.
10. "Standards of fairness" principles shall be part of the plan.

11. There shall be no gerrymandering for any reason.
12. There shall be no packing (also known as stacking) of racial minorities or political parties in districts.
13. There shall be no partisanship in drawing district boundaries.
14. Communities of interest shall be kept together, if practicable.
15. There shall be no fracturing (also known as cracking) of racial minorities or political parties.
16. There shall be no fracturing of communities of interest, if practicable.
17. Drawing bizarre district shapes shall be avoided.
18. District boundaries shall be drawn without regard to incumbent's residence, incumbent's ability to run for re-election in their current district, or whether the incumbent faces another incumbent for re-election.
19. Socio-economic factors shall be identified, documented, and included in the redistricting plan. If any factors are not used, the reasoning for such non-use shall be voted upon and documented as to the reason(s) why.
20. Keep socio-economic groups together, if practicable.
21. Documented, high-growth districts shall be drawn to receive the most negative percentages of an ideal district population so as that district continues to grow between census years, the deviations will be equalized with other districts.
22. All deviations shall be justified publicly before the final meeting of the redistricting agency and be

included in writing with the submission of the final plan.

23. To determine the number of Council Districts an area justifies, add the census tracks for each area together and divide by an "ideal" district's population. Round fractional portions of such districts to the nearest integer to determine the number of Council Districts required for that community.

24. If a population of residents must be moved to a different district to equalize deviations, move the entire subdivision as a unit, if practicable.

25. Submission of alternate plans to the Reapportionment Commission that are legal, meet the above criteria , and have lower total deviations, shall be selected for the final plan unless the redistricting agency can alter its plan to achieve lower deviations than the alternate plan offered. Documentation for the reason the alternate plan is selected or rejected shall be in writing.

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How to Draw Redistricting Plans That Will Stand Up in Court

Peter S. Wattson
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I. Introduction

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following the 2000 census so that you may learn how to draw redistricting plans that will stand up in court.

But, before I get into the cases, I think it is important to clarify some terms I will be using and to explain how the redistricting process works.

A. Reapportionment and Redistricting

"Reapportionment" is the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does.

"Redistricting" is the process of changing the district boundaries. The number of members per district does not change, but the districts' boundaries do.

The relationship between reapportionment and redistricting can most easily be seen by examining the U.S. House of Representatives. Every ten years the 435 seats in the House of Representatives are reapportioned among the 50 states in accordance with the latest federal census. As the population of some states grows faster than that of others, congressional seats move from the slow-growing states to the fast-growing ones. Then, within each of the states that is

entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. The state is redistricted to accommodate its reapportionment of congressmen.

Reapportionment, in the narrow sense in which I will be using it here, is not a partisan political process. It is a mathematical one. The decennial reapportionment of the U.S. House of Representatives is carried out in accordance with a statutory formula, called the "method of equal proportions," established in 1941. 2 U.S.C. Sections 2a and 2b. It is not subject to partisan manipulation, except in determining who gets counted in the census. The decision of Congress to use this particular formula, rather than another, has been upheld by the Supreme Court. Dept. of Commerce v. Montana, 503 U.S. 442 (1992).

Redistricting, on the other hand, is highly partisan. This is because, in redrawing district boundaries, the drafter has such wide discretion in deciding where the boundaries will run. Creative drafting can give one party a significant advantage in elections, as I shall explain in a moment.

B. Gerrymandering

The process of drawing districts with odd shapes to create an unfair advantage is called "gerrymandering."

Like "reapportionment," the term "gerrymandering" has become so popular that it has lost its original precision and is often used to describe any technique by which a political party attempts to give itself an unfair advantage.

Used in its narrow sense, to refer only to the practice of creating districts that look like monsters, there are basically just two techniques -- packing and fracturing. How do they work?

1. Packing

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts -- 70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are "wasted." They are not available to help elect representatives in other districts, so they cannot elect representatives in proportion to their numbers in the state as a whole.

2. Fracturing

"Fracturing" is drawing district lines so that the minority population is broken up. Members of the minority are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts.

C. The Facts of Life

1. Creating a Gerrymander

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and that the majority will always be tempted to draw the lines in such a way as to enhance their prospects for victory at the next election.

If the supporters of the minority party were distributed evenly throughout the state, there would be no need to gerrymander. In a state where the minority party had 49 percent of the vote, they would lose every seat.

But I suspect that political minorities are not evenly distributed in any state, so the persons drawing the redistricting plan try to determine where they are, and draw their districts accordingly: first packing as many of them into as few districts as possible and then, where they

can't be packed, fracturing them into as many districts as possible. It is this process of drawing the district lines to first pack and then fracture the minority that creates the dragon-like districts called gerrymanders.

2. The Need for Limits

The more freedom the majority has to determine where the district boundary lines will go, the greater the temptation to gerrymander. Equal-population requirements, disfavor of multimember districts, and minority representation requirements are all attempts by the courts to restrain the majority from taking unfair advantage of their majority position when drawing redistricting plans.

II. Draw Districts of Equal Population

A. Use Official Census Bureau Population Counts

1. Alternative Population Counts

The first requirement for any redistricting plan to stand up in court is to provide districts of substantially equal population. But how do you know the population? The obvious way is to use official Census Bureau population counts from the 2000 census.

It is true that some legislatures have chosen to use data other than the Census Bureau's population counts to draw their districts and have had their plans upheld by federal courts. For example, back in 1966, Hawaii used the number of registered voters, rather than the census of population, to draw its legislative districts, and had its plan upheld by the U.S. Supreme Court in the case of Burns v. Richardson, 384 U.S. 73. But there the Court found that the results based on registered voters were not substantially different from the results based on the total population count.

A state may conduct its own census on which to base its redistricting plans. For example, a 1979 Kansas legislative

redistricting plan based on the state's 1978 agricultural census was upheld by a federal district court in the case of Bacon v. Carlin, 575 F. Supp. 763 (D. Kan. 1983), aff'd 466 U.S. 966 (1984). And in 1986, a Massachusetts legislative redistricting plan based on a state census was upheld by a federal district court in the case of McGovern v. Connolly, 637 F. Supp. 111 (D. Mass 1986).

Late in the decade, a federal court may find that local government estimates are a more accurate reflection of current population than old census counts and thus are an acceptable basis for developing redistricting plans before the next census. Garza v. County of Los Angeles, Findings of Fact and Conclusions of Law, No. CV 88-5143 KN (Ex) (C.D. Cal. June 4, 1990).

But generally, the federal courts will not simply accept an alternative basis used by the states. Rather, they will first check to see whether the districts are of substantially equal population based on Census Bureau figures. If they are not, the courts will strike them down.

So, if you want your plans to stand up in court, the easiest way is use official Census Bureau population counts.

2. Use of Sampling to Eliminate Undercount

For the year 2000 census, as there was for the 1990 census, there has been a political fight over how the population should be counted.

In the 1990s, the main political fight over how to count the population concerned how to compensate for the historic undercounting of racial and ethnic minorities. In response to a suit by the City of New York and other plaintiffs that sought to compel the Census Bureau to make a statistical adjustment to the population data to account for people the Bureau failed to count, the Bureau agreed to make a fresh determination of whether there should be a statistical

adjustment for an undercount or overcount in the 1990 census. The Bureau agreed to conduct a post enumeration survey of at least 150,000 households to use as the basis for the adjustment. The Bureau agreed that, by July 15, 1991, it would either publish adjusted population data or would publish its reasons for not making the adjustment. Any population data published before then, such as the state totals published December 31, 1990, and the block totals published April 1, 1991, would contain a warning that they were subject to correction by July 15. The Bureau ultimately decided not to make a statistical adjustment to correct for the undercount, and the Supreme Court found that its decision was reasonable and within the discretion of the Secretary of Commerce, in whose Department the Census Bureau is located. Wisconsin v. City of New York, 517 U.S. 1 (1996).

For the 2000 census, the fight has been over whether to use scientific sampling techniques to conduct the census from the beginning, rather than adjusting the population counts after they have been issued. The Census Bureau proposed that, in order to obtain information on at least 90 percent of the households in each census tract, it would use statistical sampling techniques to estimate the characteristics of the households that did not respond to the first two mailings of a census questionnaire. In each census tract, the fewer households that responded initially, the larger would be the size of the sample enumerators would contact directly as part of their follow-up. The addresses that would be included in the sample would be scientifically chosen at random to insure they were statistically representative of all nonresponding housing units in that census tract.

Congress attempted to stop the use of sampling by enacting Pub. L. No. 105-119, § 209 (j), 111 Stat. 2480 (1997), which required that all data releases for the 2000 census show "the

number of persons enumerated without using statistical methods." It also authorized lawsuits to determine whether the Bureau's plan to use sampling for apportioning seats in Congress was constitutional.

In Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999), the Supreme Court ruled that the Census Act prohibits the use of sampling for purposes of apportioning representatives in Congress among the states. It did not rule on the constitutionality of using sampling to determine the distribution of population within each state for purposes of redistricting its apportionment of congressional seats or the seats in its state legislature.

Following the Supreme Court's decision, the Census Bureau announced its plan to use statistical sampling methods to conduct a postenumeration survey called the "Accuracy and Coverage Evaluation." As of May 1, 2000, the Bureau was planning to publish the census counts derived from sampling along with the head counts mandated by Pub. L. No. 105-119. In other words, each state would receive two sets of census counts for each area within the state and would have to make its own decision which count to use for each area.

3. Exclusion of Undocumented Aliens

Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states.

4. Inclusion of Overseas Military Personnel

In 1990, the Department of Defense conducted a survey of its overseas military and civilian employees and their dependents to determine their "address of record." These overseas military personnel were allocated to the states

according to their address of record for purposes of apportioning the House of Representatives, but were not included in the April 1, 1991, block counts given to the states for use in redistricting.

Allocating overseas military personnel to the states caused one congressional seat to be shifted from Massachusetts to Washington State. Massachusetts sued the Secretary of Commerce, but the Supreme Court upheld the allocation. Franklin v. Massachusetts, 505 U.S. 788 (1992).

B. Measuring Population Equality

How does a court measure the degree of population equality in a redistricting plan? Let me give you an example. Let's say we have a state with a population of one million, and that it is entitled to elect ten representatives in Congress. (That is not a realistic number, but it is easier to work with.) The "ideal" district population would be 100,000. Let's say the legislature draws a redistricting plan that has five districts with a population of 90,000 and five districts with a population of 110,000. The "deviations" of the districts would be 10,000 minus and 10,000 plus, or minus ten percent and plus ten percent. The "average deviation" from the ideal would be 10,000 or ten percent. And the "overall range" would be 20,000, or 20 percent. Most courts have used what statisticians call the "overall range" to measure the population equality of a redistricting plan, though they have usually referred to it by other names, such as "maximum deviation," "total deviation," or "overall deviation."

C. Congressional Plans

1. "As Nearly Equal in Population As Practicable"

Once you know the population, and you know how to measure the degree of population equality in a plan, how equal do the districts have to be? First, you must

understand that the federal courts use two different standards for judging redistricting plans -- one for congressional plans and a different one for legislative plans.

The standard for congressional plans is based on Article I, Section 2, of the U.S. Constitution, which says:

Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . .

The standard for congressional plans is strict equality. In the 1964 case of Wesberry v. Sanders, 376 U.S. 1, the U.S. Supreme Court articulated that standard as "as nearly equal in population as practicable."

Notice the choice of words. The Court did not say "as nearly equal as practical." The American Heritage Dictionary defines "practicable" as "capable of being . . . done . . . ." It notes that something "practical" is not only capable of being done, but "also sensible and worthwhile." It illustrates the difference between the two by pointing out that "It might be practicable to transport children to school by balloon, but it would not be practical."

In 1983, in Karcher v. Daggett, 462 U.S. 725, the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than one percent. To be precise, .6984 percent, or 3,674 people. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population.

In the 1980s, three-judge federal courts drawing their own redistricting plans achieved near mathematical equality. For example, in Minnesota the court-drawn plan had an

overall range of 46 people (.0145 percent), LaComb v. Growe, 541 F. Supp. 145 (D. Minn. 1982) aff'd mem. sub nom. Orwoll v. LaComb, 456 U.S. 966 (1982) (Appendix A, unpublished) (In its opinion, the Court tells only the sum of all the deviations, 76 people, and refers to it as the "total population deviation"), and in Colorado the court-drawn plan had an overall range of ten people (.0020 percent), Carstens v. Lamm, 543 F. Supp. 68, 99 (D. Colo. 1982).

With the improvements in the census and in the computer technology used to draw redistricting plans after the 1990 census, the degree of population equality that was "practicable" was even greater than that achieved in the 1980s. Many states drew congressional plans with an overall range of either zero or one person. That is likely to be the standard for most plans in the future.

If you can't draw congressional districts that are mathematically equal in population, don't assume that others can't. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

2. Unless Necessary to Achieve "Some Legitimate State Objective"

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve "some legitimate state objective." Karcher v. Daggett, 462 U.S. 725, 740 (1983). As Justice Brennan, writing for the 5-4 majority in Karcher v. Daggett, said:

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding

contests between incumbent Representatives . . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

So, if you intend to rely on these "legitimate state objectives" to justify any degree of population inequality in a congressional plan, you would be well advised to articulate those objectives in advance, follow them consistently, and be prepared to show that you could not have achieved those objectives in each district with districts that had a smaller deviation from the ideal. Arkansas, Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991); Maryland, Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws, 781 F. Supp. 394 (D. Md. 1991); and West Virginia, Stone v. Hechler, 782 F. Supp. 1116 (W.D. W.Va. 1992); all were able to meet that burden when congressional plans drawn by the legislature were challenged in court in the 1990s.

Near the end of the decade, the Supreme Court upheld a court-drawn congressional plan in Georgia with an overall range of 0.35 percent (about 2,000 people). Abrams v. Johnson, 117 S. Ct. 1925 (1997). But that was the lowest range of all the plans that met constitutional requirements, Georgia was able to show it had a consistent historical practice of not splitting counties outside the Atlanta area, and likely shifts in population since 1990 had made any further effort to achieve population equality illusory.

D. Legislative Plans

1. An Overall Range of Less than Ten Percent

Fortunately for those of you who will be drawing redistricting plans after the 2000 census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, Section 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the 14th Amendment.

As Chief Justice Earl Warren observed in the 1964 case of Reynolds v. Sims, 377 U.S. 533, "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts." Id. at 579.

"Substantial equality of population" has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than ten percent.

The ten-percent standard was first articulated in a dissenting opinion written by Justice Brennan in the cases of Gaffney v. Cummings, 412 U.S. 735, and White v. Regester, 412 U.S. 755, in 1973. In later cases, the Court majority has endorsed and followed the rule Justice Brennan's dissent accused them of establishing. See, e.g., Chapman v. Meier, 420 U.S. 1 (1975); Connor v. Finch, 431 U.S. 407 (1977); Brown v. Thomson, 462 U.S. 835, 842-43 (1983); Voinovich v. Quilter, 507 U.S. 146 (1993).

2. Unless Necessary to Achieve Some "Rational State Policy"

The Supreme Court in Reynolds v. Sims had anticipated that some deviations from population equality in legislative plans might be justified if they were "based on legitimate considerations incident to the effectuation of a rational state policy . . . ." 377 U.S. 533, 579 (1964). So far, the only

"rational state policy" that has served to justify an overall range of more than ten percent in a legislative plan has been respecting the boundaries of political subdivisions. And that has happened in only three cases: Mahan v. Howell, 410 U.S. 315 (1973); Brown v. Thomson, 462 U.S. 835 (1983); and Voinovich v. Quilter, 507 U.S. 146 (1993).

In Mahan v. Howell, the Supreme Court upheld a legislative redistricting plan enacted by the Virginia General Assembly that had an overall range among House districts of about 16 percent. The Court took note of the General Assembly's constitutional authority to enact legislation dealing with particular political subdivisions, and found that this legislative function was a significant and a substantial aspect of the Assembly's powers and practices, and thus justified an attempt to preserve political subdivision boundaries in drawing House districts.

Brown v. Thomson, 462 U.S. 835 (1983), upholding a legislative plan with an overall range of 89 percent, was decided by the Supreme Court on the same day that it decided Karcher v. Daggett, 462 U.S. 725 (1983), where it threw out a congressional plan with an overall range of less than one percent. Reconciling these two cases is not easy. Nevertheless, I shall try.

First, as I have noted, the constitutional standard for legislative plans is different from the standard for congressional plans.

Second, it is important to understand that in Brown v. Thomson the Court was faced with a reapportionment plan rather than with a redistricting plan. The members of the Wyoming House of Representatives were being reapportioned among Wyoming's counties, rather than having new districts created for them. Because the

boundaries of the districts were not being changed, the opportunities for partisan mischief were far reduced.

Third, Wyoming put forward a "rational state policy" to justify an overall range of more than ten percent, and the Court endorsed it. Writing for the Court, Justice Powell concluded that Wyoming's constitutional policy--followed since statehood--of using counties as representative districts and insuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas. 462 U.S. at 843-46.

But Wyoming's policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving the smallest county a representative. Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was so narrowly drawn that she had voted to reject it. 462 U.S. at 850. The Court reaffirmed this narrow view of its holding in Brown by later citing it as authority for the statement that "no case of ours has indicated that a deviation of some 78% could ever be justified." Board of Estimate v. Morris, 489 U.S. 688, 702 (1989).

In Voinovich v. Quilter, 507 U.S. 146 (1993), the Supreme Court reversed a decision of the federal district court striking down Ohio's legislative plan because the overall

range of the House plan was 13.81 percent and the overall range of the Senate plan was 10.54 percent. The Court pointed out that preserving the boundaries of political subdivisions was a "rational state policy" that might justify an overall range in excess of ten percent.

There may not be any other "rational state policies" that will justify a legislature in exceeding the ten-percent standard. But with the multitude of plans that are likely to be submitted to you for your consideration, you may wish to adopt other policies to govern plans that are within the ten-percent overall range.

Three-judge courts, who are called upon to draw redistricting plans when legislatures do not, often have adopted criteria for the parties to follow in submitting proposed plans to the court. These criteria are not required by the federal constitution, and have not been used to justify exceeding the ten-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These criteria often have included:

- districts must be composed of contiguous territory; Carstens v. Lamm, 543 F. Supp. 68, 87-88 (D. Colo. 1982); Shayer v. Kirkpatrick, 541 F. Supp. 922, 931 (W.D. Mo. 1982) aff'd sub nom. Schatzle v. Kirkpatrick, 456 U.S. 966 (1982); LaComb v. Growe, 541 F. Supp. 145, 148 (D. Minn. 1982);

- districts must be compact; e.g., Carstens v. Lamm, 543 F. Supp. at 87-88; Shayer v. Kirkpatrick, 541 F. Supp. at 931; LaComb v. Growe, supra; South Carolina State Conference of Branches of the National Association for the Advancement of Colored People v. Riley, 533 F. Supp. 1178, 1181 (D. S.C. 1982); Dunnell v. Austin, 344 F. Supp. 210 (E.D.

Mich. 1972); David v. Cahill, 342 F. Supp. 463 (D. N.J. 1972); Preisler v. Secretary of State, 341 F. Supp. 1158 (W.D. Mo. 1972); Skolnick v. State Electoral Board, 336 F. Supp. 839, 843 (N.D. Ill. 1971); Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 253 F. Supp. 731, 734 (D. Md. 1966) aff'd mem. sub nom. Alton v. Tawes, 384 U.S. 315 (1966); and

- districts should attempt to preserve communities of interest; e.g., Carstens v. Lamm, 543 F. Supp. at 91-93; Shayer v. Kirkpatrick, 541 F. Supp. at 934; LaComb v. Growe, supra; Riley, 533 F. Supp. at 1181; Dunnell v. Austin, 344 F. Supp. at 216; Tawes, 253 F. Supp. at 735; Skolnick, 336 F. Supp. at 845-46.

As of 1983, the constitutions of 27 states required districts to be composed of contiguous territory, and the constitutions of 21 states required that districts be compact. Karcher v. Daggett, 462 U.S. 725, 756 n. 18 (1983) (Stevens, J., concurring).

The Supreme Court has begun to refer to these criteria (including respecting the boundaries of political subdivisions) as "traditional districting principles." See, e.g., Shaw v. Reno, 509 U.S. 630, 647 (1993) (slip op. at 6-17); Miller v. Johnson, 515 U.S. 900, 919 (slip op. at 16) (1995); Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894, 1901 (1996); Bush v. Vera, 517 U.S. 952, ____, 116 S. Ct. 1941, 1952 (1996); Abrams v. Johnson, 117 S. Ct. 1925, 1932-38 (1997).

III. Don't Discriminate Against Racial or Language Minorities

A. Section 2 of the Voting Rights Act

1. No Discriminatory Effect

Assuming that you are prepared to meet equal population requirements, you will also want to make sure you do not discriminate against minorities.

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973[1], attempts to secure this political power for racial and language minorities by prohibiting states and political subdivisions from imposing or applying voting qualifications; prerequisites to voting; or standards, practices, or procedures to deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group.

Section 2 has been used to attack reapportionment and redistricting plans on the ground that they discriminated against Blacks or Hispanics and abridged their right to vote by diluting the voting strength of their population in the state.

Until the U.S. Supreme Court case of City of Mobile v. Bolden, 446 U.S. 55, in 1980, the courts generally considered whether a particular redistricting plan had the effect of diluting the voting strength of the Black population. In Bolden, Black residents of Mobile, Alabama, charged that the city's practice of electing commissioners at large diluted minority voting strength. The Supreme Court, however, refused to throw out the at-large plan. The Court interpreted Section 2 as applying only to actions intended to discriminate against Blacks, and since the plaintiffs had failed to prove that it was adopted with an intent to discriminate against Blacks, the Court concluded that the plan did not violate Section 2.

Congress quickly rejected the Court's interpretation by amending Section 2. As enacted, it had prohibited conduct "to deny or abridge" the rights of racial and language

minorities. 42 U.S.C.A. § 1973 (1981). The 1982 amendments changed that to prohibit conduct "which results in a denial or abridgement" of those rights. Pub.L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134, codified as amended at 42 U.S.C. § 1973. Congress also decided to codify the pre-Bolden case law by adding:

A violation of [section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

2. The Three Gingles Preconditions

The 1982 amendments to Section 2 were first considered by the Supreme Court in the 1986 case of Thornburg v. Gingles, 478 U.S. 30, which challenged legislative redistricting plans in North Carolina. At issue were one multimember Senate district, one single-member Senate district, and five multimember House districts. Justice Brennan's majority opinion upheld the constitutionality of Section 2, as amended. In order to assist courts in evaluating challenges to redistricting plans, Justice Brennan imposed three preconditions that a plaintiff must prove before a court must proceed to a detailed analysis of a plan:

1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.

478 U.S. at 50-51.

The Court has since held that the three preconditions also apply to Section 2 challenges to single-member districts. Growe v. Emison, 507 U.S. 25, 40-41 (1993).

3. "The Totality of the Circumstances"

Once these three preconditions are satisfied, Justice Brennan said that a court must consider several additional "objective factors" in determining the "totality of the circumstances" surrounding an alleged violation of Section 2. They include the following:

1) the extent of the history of official discrimination touching on the class participation in the democratic process;

2) racially polarized voting;

3) the extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, antisingle-shot provisions, or other voting practices that enhance the opportunity for discrimination;

4) denial of access to the candidate slating process for members of the class;

5) the extent to which the members of the minority group bear the effects of discrimination in areas like education,

employment, and health, which hinder effective participation;

6) whether political campaigns have been characterized by racial appeals;

7) the extent to which members of the protected class have been elected;

8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the group; and

9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

478 U.S. at 36-37.

In Gingles, the Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected.

4. Draw Districts the Minority Has a Fair Chance to Win

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented members of the minority from being elected in the past, you may have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. How much of a majority is that?

Under Section 2, that depends on "the totality of the circumstances." In other words, there is no fixed rule that applies to all cases.

The Supreme Court, in the case of United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 164 (1977), upheld a determination by the Justice Department that a 65 percent non-White population

majority was required to achieve a non-White majority of eligible voters in certain legislative districts in New York City.

The Court of Appeals for the Seventh Circuit, in the case of Ketchum v. Byrne, 740 F.2d 1398 (1984), endorsed the use of a 65 percent Black population majority to achieve an effective voting majority in the absence of empirical evidence that some other figure was more appropriate.

Ketchum involved the redistricting of city council wards in the city of Chicago after the 1980 census. The Court of Appeals found that "minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote," and that therefore, voting age population was a more appropriate measure of their voting strength than was total population. Further, because the voting age population of Blacks usually has lower rates of voter registration and voter turnout, the district court should have considered the use of a supermajority, such as 65 percent of total population or 60 percent of voting age population when attempting to draw districts the Blacks could win. The Court of Appeals noted that:

[J]udicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.

. . . This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out . . . .

Id. at 1415.

But the Court of Appeals in Ketchum also noted that "The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data," id. at 1416. In redistricting following the 1990 census, several courts found that, in view of rising rates of voter registration and voter participation among minority groups, a minority voting age population of slightly more than 50 percent was sufficient to provide an effective voting majority.

The Seventh Circuit in Ketchum warned that "provision of majorities exceeding 65%-70% may result in packing." Id. at 1418. But the Court of Appeals for the First Circuit upheld a redistricting plan for the city of Boston where, of two districts where Blacks were a majority, one district had a Black population of 82.1 percent. Latino Political Action Committee v. City of Boston, 784 F.2d 409 (1st Cir. 1986). The Court found that this packing of Black voters did not discriminate against Blacks because there was only a moderate degree of racial polarization. As the Court said, "[T]he less cohesive the bloc, the more "packing" needed to assure . . . a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance.)" Id. at 414. The Black population was so distributed that, even if fewer Blacks were put into these two districts, there were not enough Blacks to create a third district with an effective Black majority. Id.

If you face a charge of a Section 2 violation, you had better be prepared with empirical data show what is "reasonable and fair" under "the totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

B. Section 5 of the Voting Rights Act

1. In "Covered Jurisdictions," Plans Must be Precleared

While Section 2 of the Voting Rights Act applies throughout the United States, Section 5, codified as amended at 42 U.S.C. § 1973c, applies only to certain covered jurisdictions, which are listed in table 6 of NCSL's new book Redistricting Law 2000 . If you're covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be cleared, before they take effect, by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.

2. Do Not Regress

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan fails to meet the no "retrogression" test, first set forth in Beer v. United States, 425 U.S. 130 (1976), and reaffirmed in City of Lockhart v. United States., 460 U.S. 125 (1985). Simply stated, the test means that a plan will not be precleared if it makes the members of a racial or language minority worse off than they were before. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.

Beer was a challenge to the 1971 redistricting of the city council seats for the city of New Orleans. Since 1954, two of the seven council members had been elected at large; five others had been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered

voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks' electoral power.

To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a ten-year history of the success of the minority at electing representatives.

In 1987, the Justice Department announced that, notwithstanding the retrogression test employed by the courts when considering preclearance under Section 5, the Justice Department would apply the stricter standards of Section 2 when deciding whether to preclear a plan under Section 5. Supplemental Information, 52 Fed. Reg. 487 (1987). This practice has now been discredited by the Supreme Court. See Reno v. Bossier Parish School Bd., 117 S. Ct. 1491 (1997).

The Bossier Parish (Louisiana) School Board had redrawn its 12 single-member districts following the 1990 census, using the same plan already precleared for use by its governing body. In doing so, it rejected a plan proposed by the NAACP that would have created two majority-Black districts. The Justice Department refused to grant preclearance on the ground that the NAACP plan demonstrated that Black residents could have been given more opportunity to elect candidates of their choice and that therefore their voting strength was diluted in violation of Section 2. The Supreme Court rejected this argument, saying that preclearance under Section 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates Section 2. The Court pointed out that sections 2 and 5 were designed to

combat two different evils, and that Section 5 was only directed at effects that are retrogressive.

Even though your plan doesn't make racial or language minorities any worse off than they were before, and therefore gets precleared by the Justice Department, don't think that you are immune from a challenge under Section 2. The Justice Department made it clear in 1987 that "Section 5 preclearance will not immunize any change from later challenge by the United States under amended Section 2." Supplemental Information, 52 Fed. Reg. 487 (1987). After Bossier Parish, a subsequent attack by the Justice Department against a precleared plan seems even more likely.

3. You Need Not Maximize the Number of Minority Districts

Notwithstanding anything you might have been told by the Justice Department in the 1990s, you are not required to maximize the number of majority-minority districts.

In the 1990s round of redistricting, the natural desire of some minority populations to be grouped together in districts they could win coincided with the desire of some plan drafters to pack them. Since African Americans and Hispanics have tended to vote Democratic, Republican plan drafters were more than willing to accommodate their desire to have districts drawn for them. When new redistricting plans were drawn in preparation for the 1991 and 1992 elections, the Justice Department was controlled by Republicans. As states like North Carolina, Georgia, Louisiana, and Texas presented their plans to the Justice Department for approval, the Justice Department insisted that they create additional majority-minority districts wherever the minority populations could be found to create them. This insistence was not limited by any concern that

the districts be "geographically compact." The States' plans were first denied preclearance and then, after majority-minority districts were added, the plans were precleared. These plans have now all been struck down by the courts. Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd sub nom. Miller v. Johnson, 515 U.S. 900 (1995); Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996); Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996).

The Justice Department's policy of pressuring states to maximize the number of majority-minority districts was not based on a correct reading of the Voting Rights Act.

Section 2 included a proviso, added through the efforts of Senator Dole in 1982, that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). In other words, Section 2 did not mandate proportional representation. So, how could it be construed by the Justice Department to require that a minority group be given the maximum number of elected representatives?

In Johnson v. DeGrandy, 512 U.S. 997 (1994), the Supreme Court found that it could not be so construed. The Florida Legislature had drawn a House plan that created nine districts in Dade County (Miami) where Hispanics had an effective voting majority. Miguel DeGrandy and the Justice Department attacked the plan in federal court, alleging that the Hispanic population in Dade County was sufficient to create 11 House districts where Hispanics would have an effective voting majority. The district court agreed, imposing its own plan (based on one submitted by DeGrandy) that created 11 Hispanic districts. The Supreme Court reversed, saying that maximizing the number of

majority-minority districts was not required. As Justice Souter said in his opinion for the Court, "Failure to maximize cannot be the measure of § 2." 512 U.S. 1017 (slip op. at 20). Indeed, even a failure to achieve proportionality does not, by itself, constitute a violation of Section 2. 512 U.S. at 1009-12 (slip op. at 11-14).

The Court refused to draw a bright line giving plan drafters a safe harbor if they created minority districts in proportion to the minority population. That, the Court said, would ignore the clear command of the statute that the question of whether minority voters have been given an equal opportunity to elect representatives of their choice must be decided based on "the totality of the circumstances," rather than on any single test. It would encourage drafters to draw majority-minority districts to achieve proportionality even when they were not otherwise necessary and would foreclose consideration of possible fragmentation of minority populations among other districts where they were not given a majority. 512 U.S. at 1017-21 (slip op. at 20-24).

In the Georgia congressional redistricting case, Miller v. Johnson, 515 U.S. 900 (1995), the Supreme Court scolded the Justice Department for having pursued its policy of maximizing the number of majority-minority districts. As the Court said:

Although the Government now disavows having had that policy . . . and seems to concede its impropriety . . . the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans . . . . In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

515 U.S. at 924-25.

C. Equal Protection Clause of the 14th Amendment

When drawing a minority district to avoid a violation of Section 2 or Section 5 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the Equal Protection Clause of the 14th Amendment.

1. You May Consider Race in Drawing Districts

Race-based redistricting is not always unconstitutional. As the Supreme Court recognized in Shaw v. Reno, 509 U.S. 630 (1993):

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature is always aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646 (slip op. at 14).

You may even intentionally create majority-minority districts, as a California state court did, see DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd 515 U.S. 1170 (1995), without violating the Equal Protection clause. Bush v. Vera, 517 U.S. 952, ____, 116 S. Ct. at 1951 (1996).

2. Avoid Drawing a Racial Gerrymander

But, when a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably thrown out. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996). If you want your majority-minority districts to stand up in court, you would best avoid drawing a racial gerrymander.

a. Beware of Bizarre Shapes

The first step toward avoiding drawing a racial gerrymander is to beware of bizarre shapes.

The 12th Congressional District in North Carolina, as put into place for the 1992 election, was one of the most egregious racial gerrymanders ever drawn. The "I-85" district, stretching 160 miles across the State, for much of its length no wider than the freeway, but reaching out to pick up pockets of African Americans all along the way. It was first attacked as a partisan gerrymander. That attack failed.

Pope v. Blue, 809 F. Supp. 392 (W.D. N.C. 1992), aff'd mem. 506 U.S. 801 (1992).

Next, it was attacked as a racial gerrymander. That attack failed in the district court, Shaw v. Barr, 809 F. Supp. 392 (W.D. N.C. 1992), but the legal theory on which it was based was endorsed by the Supreme Court in Shaw v. Reno, 509 U.S. 630 (1993).

As Justice O'Connor said, "[R]eapportionment is one area in which appearances do matter." 509 U.S. at 647 (slip op. at 15).

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls . . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647-48 (slip op. at 15-16).

The Court said that a redistricting plan that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny under the Equal Protection Clause given to other state laws that classify citizens by race. 509 U.S. at 644 (slip op. at 12).

In Bush v. Vera, Justice O'Connor further observed that:

[B]izarre shape and noncompactness cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [C]utting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of identity and thus intensifies the emphasis on race.

517 U.S. 952, ____,116 S. Ct. at 1962 (1996).

b. Draw Districts that are Reasonably Compact

To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? Reasonably compact. As Justice O'Connor said in Bush v. Vera, 517 U.S. 952 (1996):

A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

517 U.S. at ____, 116 S. Ct. at 1960.

To give you some idea of what the lower federal courts have considered to be "reasonably compact," there follows a series of "before and after" pictures of congressional districts first used in the 1992 election and then struck down, and the districts approved by the federal courts to replace them. They come from the states of Texas, Louisiana, Florida, and North Carolina.

A 190

Texas

Congressional District 30

1992

1996

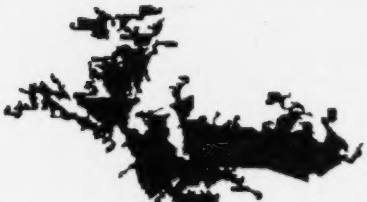
Congressional District 18

1992

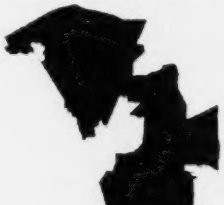
1996

Congressional District 29

1992



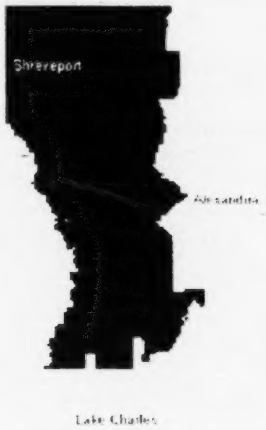
1996



A 191
Louisiana
Congressional District 4

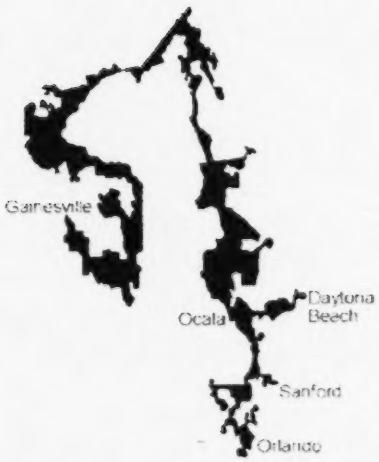
1992

1996



Florida
Congressional District 3

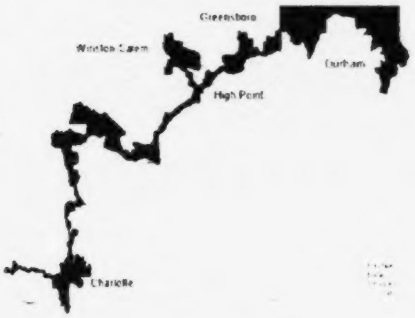
1992



1996

North Carolina
Congressional District 12

1992



1998

2000

c. Beware of Making Race Your Dominant Motive

Even if the shapes of your districts are not bizarre, and even if they are reasonably compact, you may nevertheless run afoul of the Equal Protection Clause if race was your dominant motive for drawing the lines the way you did.

Georgia's 11th Congressional District, as enacted in 1992, stretched from Atlanta to the sea, but not in the 60-mile-wide swath cleared by General Sherman. Rather, it began with a small pocket of Blacks in Atlanta, spread out to pick up the sparsely populated rural areas, and narrowed considerably to pick up more pockets of Blacks in Augusta and Savannah, 260 miles away. Miller v. Johnson, 515 U.S. 900, 908-09 (1995). It had not been included in either of the first two plans enacted by the Legislature in 1991 and sent to the Department of Justice for preclearance. Both of those plans had included two Black-majority districts. The Justice Department had rejected them for failure to create a third. This rejection had occurred notwithstanding that the 1980 plan had included only one Black-majority district and that there was no evidence the Georgia Legislature had intended to discriminate against Blacks in drawing the 1991 plans. The new district in the 1992 plan was drawn to meet the Department's requirement that the State maximize the

number of Black-majority districts, and it's inclusion in the third plan was sufficient to obtain preclearance from the Justice Department. 515 U.S. at 906-09.

In Miller v. Johnson, 515 U.S. 900 (1995), the Supreme Court shifted its focus away from the shape of the district, saying that plaintiffs challenging a racial gerrymander need not prove that a district has a bizarre shape. The shape of the district is relevant, not because bizarreness is a necessary element of the constitutional wrong, but because it may be persuasive circumstantial evidence that race was the Legislature's dominant motive in drawing district lines. Where district lines are not so bizarre, plaintiffs may rely on other evidence to establish race-based redistricting. 515 U.S. at 912-13.

In Georgia's case, the Legislature's correspondence with the Justice Department throughout the preclearance process demonstrated that race was the dominant factor the Legislature considered when drawing the 11th District. The Court found that the Legislature had considered "traditional race-neutral districting principles," such as compactness, contiguity, and respect for political subdivisions and communities of interest, but that those principles had been subordinated to race in order to give the 11th District a Black majority. 515 U.S. at 919-20. The Court subjected the district to strict scrutiny and struck it down. 515 U.S. at 920-27.

d. Beware of Using Race as a Proxy for Political Affiliation

If you want to argue that partisan politics, not race, was your dominant motive in drawing district lines, beware of using racial data as a proxy for political affiliation. The Texas Legislature tried that in the 1990s, and three of its congressional districts were struck down.

Congressional District 30

Congressional District 18

Congressional District 29

Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic-majority district in South Texas, one new African American majority district in Dallas County (District 30), and one new Hispanic-majority district in the Houston area (District 29). In addition, the Legislature decided to reconfigure a district in the Houston area (District 18) to increase its percentage of African Americans. The Texas Legislature had developed a state-of-the-art computer system that allowed it to draw congressional districts using racial data at the census block level. Working closely with the Texas congressional delegation and various members of the Legislature who intended to run for Congress, the Texas Legislature took great care to draw three new districts and reconfigure a district that the chosen candidates could win.

Plaintiffs challenged 24 of the State's 30 congressional districts as racial gerrymanders. The federal district court struck down three, Districts 18, 29, and 30, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994). On appeal, the State argued that the bizarre shape of District 30 in Dallas County was explained by the drafters' desire to unite urban communities of interest and that the bizarre shape of all

three districts was attributable to the Legislature's efforts to protect incumbents of old districts while designing the new ones. The Supreme Court upheld the district court's finding to the contrary, holding that race was the predominant factor. The Legislature's redistricting system had election data and other political information at the precinct level, but it had race data down to the block level. The district lines closely tracked the racial block data. The Court found that, to the extent there was political manipulation, race was used as a proxy for political affiliation. It was race that predominated. Bush v. Vera, 517 U.S. 952, ___, 116 S. Ct. 1941, 1959-61 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at ____, 116 S. Ct. at 1961-62.

e. Follow Traditional Districting Principles

As the preceding discussion shows, one way to avoid drawing a racial gerrymander that runs afoul of the Equal Protection Clause is to follow traditional districting principles. What are "traditional districting principles" and where do they come from?

The Supreme Court first used the term "traditional districting principles" in the 1993 North Carolina case, mentioning "compactness, contiguity, and respect for political subdivisions" as examples. Shaw v. Reno, 509 U.S. 630 at 647 (slip op. at 15). Later, in the 1995 Georgia case, it added "respect for . . . communities defined by actual shared interests." Miller v. Johnson, 515 U.S. 900, 919-20 (1995). In the Texas case, it added "maintaining . . . traditional boundaries." Bush v. Vera, 517 U.S. 952, ____ , 116 S. Ct. at 1960 (1996). And in the 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." Abrams v. Johnson, 117 S. Ct. 1925, ____ (slip op. at 8-9).

These "traditional districting principles" are not found in the U.S. Constitution, but rather in the constitutions, laws, and resolutions of the several states. The districting principles used by each state in the 1990s are shown in table 5 and appendix G of NCSL's book, Redistricting Law 2000. The Supreme Court has now mentioned all of the most common districting principles used by the states, but there are a number of others used only by a few states.

Before drawing any plan for your state, you will want to become familiar with the requirements of your own constitution and consider whether to adopt additional districting principles to govern your plans.

3. Strict Scrutiny is Almost Always Fatal

If you do choose to subordinate traditional districting principles to race in order to create a majority-minority district, be aware that it is unlikely your district will stand up in court. A racial gerrymander is subject to strict scrutiny under the Equal Protection Clause of the 14th Amendment. Shaw v. Reno, 509 U.S. 630 (1993). To survive strict scrutiny, a racial classification must be narrowly tailored to serve a compelling governmental interest. Id.

a. A Compelling Governmental Interest

What may qualify as a "compelling governmental interest"? So far, the Supreme Court has considered remedying past discrimination, avoiding retrogression in violation of Section 5 of the Voting Rights Act, and avoiding a violation of Section 2 of the Voting Rights Act to be possible compelling governmental interests.

b. Narrowly Tailored to Achieve that Interest

During the 1990s, however, no racial gerrymander was explicitly found by the Supreme Court to have been sufficiently narrowly tailored to achieve any of these

compelling governmental interests. See, e.g., Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996); contra, King v. State Board of Elections, 979 F. Supp. 582 (N.D. Ill. 1996), vacated mem. sub nom. King v. Illinois Board of Elections, 117 S. Ct. 429, on remand 979 F. Supp. 619 (N.D. Ill. 1997), aff'd mem. 118 S. Ct. 877 (1998). Don't assume that yours will be the first.

(1) Remedying Past Discrimination

Remedying past discrimination has traditionally been a justification for a governmental entity to adopt a racial classification. See, e.g., Richmond v. J.A. Crosun Co., 488 U.S. 469, 491-93 (1989); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280-82 (1986). In the context of redistricting, this justification has not yet proved sufficient. In Shaw v. Reno, the Supreme Court warned that the State must have "a strong basis in evidence for concluding that remedial action is necessary," 509 U.S. 630, 656(slip op. at 24), and that "race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State employs sound districting principles, and only when the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." 509 U.S. at 657 (slip op. at 25) (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12th congressional district was struck down. Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996).

In Bush v. Vera, 517 U.S. 952 (1996), the Court found that the district lines drawn by the Texas Legislature were not justified as an attempt to remedy the effects of past discrimination, since there was no evidence of present discrimination other than racially polarized voting.

(2) Avoiding Retrogression Under Section 5

The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of Section 5 of the Voting Rights Act would be a compelling governmental interest.

In Shaw v. Reno, 509 U.S. 630 (1993), the Court anticipated that the State might assert on remand that complying with Section 5 was a compelling governmental interest that justified the creation of District 12. But the Court warned that "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." 509 U.S. at 655 (slip op. at 23). In Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996), the Court noted that, before the 1990 census, North Carolina had had no Black-majority districts. The first plan drawn by the State after the 1990 census had included one Black-majority district, not District 12. The Court found that adding District 12 as a second Black-majority district was not necessary in order to avoid retrogression. 517 U.S. at ____, 116 S. Ct. at 1904. Since the 12th district was not narrowly tailored to serve the State's interest in complying with Section 5, or any other compelling state interest, the Court struck it down.

In Miller v. Johnson, 515 U.S. 900 (1995), the Court found that it was not necessary for the Georgia Legislature to draw a third Black-majority district in order to comply with Section 5. The plan for the 1980s had included one Black-majority district. The first two previous plans enacted by the Georgia Legislature after the 1990 census had included two Black-majority districts, thus improving on the status quo. Adding a third Black-majority district was not necessary and thus not narrowly tailored to achieve the State's interest in complying with Section 5. 515 U.S. at 920-27.

On remand, the federal district court first allowed the Georgia Legislature an opportunity to draw a new plan. When the Legislature failed to agree on a plan, the district court found that Georgia's Second Congressional District was also an unconstitutional racial gerrymander. Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga., Dec. 1, 1995). The district court reasoned that, since the enacted plan was the product of improper pressure imposed by the Justice Department, it did not embody the Legislature's own policy choices and therefore should not be used as the basis for the court's remedial plan. The district court then imposed an entirely new plan with only one Black-majority district, District 4. Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga., Dec. 13, 1995).

Georgia Congressional District 4 - 1996

The court's plan was used for the 1996 election, but the district court's decision was appealed to the Supreme Court on the ground that the court failed to give due deference to the Legislature's policy choices.

In Abrams v. Johnson, 117 S. Ct. 1925 (1997), the Supreme Court affirmed. It found that neither the Legislature's 1991

plan, rejected by the Justice Department because it contained only two Black-majority districts, nor the 1992 plan, with three Black-majority districts, embodied the Legislature's own policy choices because of the improper pressure imposed by the Justice Department. It found the district court was within its discretion in deciding it could not draw two Black-majority districts without engaging in racial gerrymandering. Since the last valid plan, the 1982 plan, contained only one Black-majority district, the district court's one-district plan did not retrogress in violation of Section 5 of the Voting Rights Act.

(3) Avoiding a Violation of Section 2

In Shaw v. Reno, 509 U.S. 630 (1993), the Supreme Court noted that the State of North Carolina had asserted that a race-based district was necessary to comply with Section 2 of the Voting Rights Act. The Court left the arguments on that question open for consideration on remand. 509 U.S. at 655-56 (slip op. at 23-24).

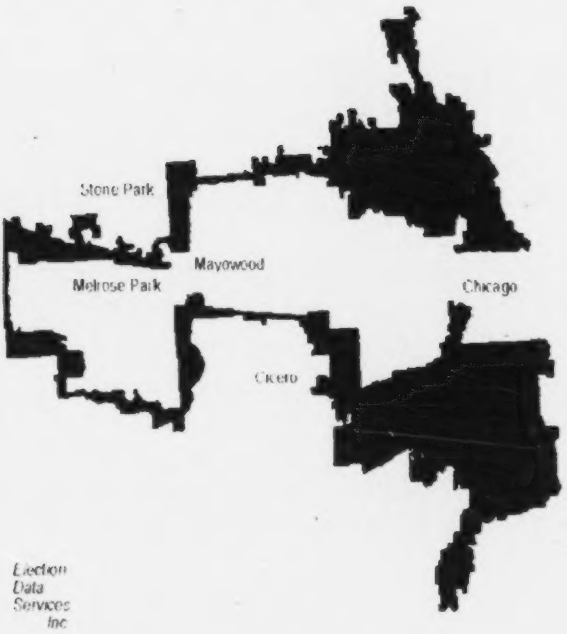
When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both Section 2 and Section 5, Shaw v. Hunt, 861 F. Supp. 408 (E.D. N.C. 1994), the Supreme Court again reversed the district court.

The Court said that, to make out a violation of section 2, a plaintiff must show that a minority population is "sufficiently large and geographically compact to constitute a majority in a single member district." The Court noted that District 12 had been called "the least geographically compact district in the Nation." Shaw v. Hunt, 517 U.S. 899, ____, 116 S. Ct. 1894, 1901 (1996). There may have been a place in North Carolina where a geographically compact minority population existed, but the shape of District 12 showed that District 12 was not that place. Since District 12

did not encompass any "geographically compact" minority population, there was no legal wrong for which it could be said to provide the remedy. 517 U.S. at ____, 116 S. Ct. 1906.

In the Texas case, Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1894 (1996), the Court again assumed without deciding that complying with Section 2 was a compelling state interest, 517 U.S. at ____, 116 S. Ct. at 1960, but found that the districts were not narrowly tailored to comply with Section 2 because all three districts were bizarrely shaped and far from compact as a result of racial manipulation. The court pointed out that, if the minority population is not sufficiently compact to draw a compact district, there is no violation of Section 2; if the minority population is sufficiently compact to draw a compact district, nothing in Section 2 requires the creation of a race-based district that is far from compact. 517 U.S. at ____, 116 S. Ct. at 1961.

During the 1990s, one racial gerrymander did survive strict scrutiny: the Fourth Congressional District of Illinois, the "ear muff" district in Chicago. It was found necessary in order to achieve the compelling state interest of remedying a potential violation of or achieving compliance with Section 2 of the Voting Rights Act.



Following the Supreme Court's decision in Shaw v. Reno, 509 U.S. 630 (1993), plaintiffs in Illinois attacked District 4. The district had been drawn by a federal district court to create an Hispanic-voting-majority district without diminishing the African American voting strength in three adjacent districts with African American majorities. When forced to review the prior decision in the light of Shaw v. Reno and Miller v. Johnson, a different panel of the district court found that the compactness requirement of Thornburg v. Gingles applied only in determining whether a Section 2 violation had occurred, not in drawing a district to remedy the violation. It found that the ear muff shape was necessary in order to provide Hispanics with the representation that their population warranted without causing retrogression in African American representation. It held that the Fourth District survived strict scrutiny. King v. State Board of Elections, 979 F. Supp. 582 (N.D. Ill. 1996).

Plaintiffs appealed. The Supreme Court vacated the judgment and remanded to the district court for further consideration in light of its decisions in the North Carolina and Texas cases. King v. Illinois Board of Elections, 117 S. Ct. 429 (1996) (mem.).

On remand, the district court found that the Fourth District had been narrowly tailored to achieve the compelling state interest of remedying a potential violation of or achieving compliance with Section 2 and, therefore, did not violate the Equal Protection Clause. King v. State Board of Elections, 979 F. Supp. 619 (N.D. Ill. 1997), aff'd mem. 118 S. Ct. 877 (1998).

IV. Don't Go Overboard with Partisan Gerrymandering

A. Partisan Gerrymandering is a Justiciable Issue

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in some states and Democrats in others. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

Modern technology, while making it practicable to draw districts that are mathematically equal, has also allowed the majority to draw districts that pack and fracture the partisan minority in such a way as to minimize the possibility of their ever becoming a majority.

While the federal courts have not yet developed criteria for judging whether a gerrymandered redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court has held, in Davis v. Bandemer, 478 U.S. 109 (1986), that partisan gerrymandering is a justiciable issue. What this means is that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground

that they unconstitutionally discriminate against the partisan minority.

Davis v. Bandemer involved a legislative redistricting plan adopted by the Indiana Legislature in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, the equal protection of the laws.

The plan had an overall range of 1.15 percent for the Senate districts and 1.05 percent for the House districts, well within equal-population requirements. The plan's treatment of racial and language minorities met the no-retrogression test of the Voting Rights Act.

The Senate was all single-member districts, but the House included nine double-member districts and seven triple-member districts, in addition to 61 that were single-member. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed, although township lines generally were. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts with large Democratic majorities, and fractured into districts where Republicans had a safe but not excessive majority. The Speaker of the House testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

At the 1982 election, held under the challenged plan, Democratic candidates for the Senate received 53.1 percent of the vote statewide and won 13 of the 25 seats up for election. (Twenty-five other Senate seats were not up for election.) Democratic candidates for the House received

51.9 percent of the vote statewide, but won only 43 of 100 seats. In two groups of multimember House districts, Democratic candidates received 46.6 percent of the vote, but won only 3 of 21 seats.

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan denied them fair representation. The Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that:

[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

. . . Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. (Emphasis added.)

. . . Such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

478 U.S. at 132-33.

Merely showing that the minority is likely to lose elections held under the plan is not enough. As the Court pointed out, "the power to influence the political process is not limited to winning elections. . . . We cannot presume . . . , without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her]." 478 U.S. at 132.

B. Can It Be Proved?

How do the members of a major political party prove that they do not have "a fair chance to influence the political process?"

When California Republicans attacked the partisan gerrymander enacted by the Democratic legislature to govern congressional redistricting, the Supreme Court summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans had failed to show that they had been denied a fair chance to influence the political process. Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), aff'd mem., 488 U.S. 1024 (1989). As the lower court said:

Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' [citation omitted] There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies. [citation omitted]

694 F. Supp. at 670.

Further, the Court took judicial notice that Republicans held 40 percent of the congressional seats and had a Republican governor and United States senator.

Given also the fact that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in 'the political process as a whole' because of the paralysis of an unfair gerrymander.

694 F. Supp. at 672.

During the 1990s, the Virginia state house plan and the North Carolina congressional plan were attacked as partisan political gerrymanders, but both attacks failed. Republican Party of Virginia v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991); Pope v. Blue, 809 F. Supp. 392 (W.D. N.C. 1992), aff'd mem. 506 U.S. 801 (1992).

In a democracy, the majority does not need to have the leaders of the opposition shot, or jailed, or banished from the country, or even silenced. They do not need to shut the minority out of the political process--they simply out vote them.

If the members of the majority party in your State are prepared to let the minority party participate fully in the process of drawing redistricting plans, and simply out vote them when necessary, your State should be prepared to withstand a challenge that the plans unconstitutionally discriminate against the partisan minority.

V. Prepare to Defend Your Plan in Both State and Federal Courts

After the 1990 census, 20 states had suits in state courts concerning redistricting plans; 28 states had suits in federal court. Eleven states had suits in both state and federal courts on the same plan. New York had cases in four different federal courts and three different state courts.

After the 2000 census, you had better be prepared to defend your plan in both state and federal courts at the same time. How should all this parallel litigation be coordinated?

A. Federal Court Must Defer to State Court

In a 1965 case, Scott v. Germano, 381 U.S. 407 (per curiam), the Supreme Court recognized that state courts have a significant role in redistricting and ordered the federal district court to defer action until the state authorities, including the state courts, had had an opportunity to redistrict. In the 1990s, some federal district courts properly deferred action pending the outcome of state proceedings. See, e.g., Members of the Cal. Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), rev'd, Benavidez v. Eu, 34 F.3d 825 (9th Cir. 1994) (deferral until conclusion of state proceedings was proper; dismissal "went too far"), but others did not. See, e.g., Puerto Rican Legal Defense and Education Fund v. Gantt, 796 F. Supp. 677 (E.D. N.Y. 1992), injunction stayed mem. sub nom. Gantt v. Skelos, 504 U.S. 902 (1992).

In Minnesota, after a state court had issued a preliminary order correcting the technical errors in the legislative plan enacted by the Legislature, the federal district court enjoined the state court from issuing its final plan. Emison v. Growe, Order, No. 4-91-202 (D. Minn. Dec. 5, 1991). The U.S. Supreme Court summarily vacated the injunction a month later. Cotlow v. Emison, 502 U.S. 1022 (1992) (mem.). After the state court issued its final order on the legislative plan and had held its final hearing before adopting a

congressional plan, the federal court threw out the state court's legislative plan, issued one of its own, and enjoined the secretary of state from implementing any congressional plan other than the one issued by the federal court. Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992). The federal court's order regarding the legislative plan was stayed pending appeal, Growe v. Emison, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers), but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In Growe v. Emison, 507 U.S. 25 (1993), the Court held that the district court had erred in not deferring to the state court. The Court repeated its words from several previous cases that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." 507 U.S. at 34. As the court said:

Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer. 507 U.S. at 35.

Rather than coming to the rescue of the Minnesota electoral process, the federal court had raced to beat the state court to the finish line, even tripping it along the way. 507 U.S. at 37. It would have been appropriate for the federal court to have established a deadline by which, if the state court had not acted, the federal court would proceed. 507 U.S. at 34. However, the Supreme Court found that the state court had been both willing and able to adopt a congressional plan in time for the elections. Id. The Supreme Court reversed the federal court's decision in its entirety, allowing the state court's congressional plan to become effective for the 1994 election.

B. Federal Court May Not Directly Review State Court Decision

Once a state court has completed its work, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give the state court's judgment the same effect as it would have in the State's own courts. Parsons Steel Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986). A federal district court may not simply modify or reverse the state court's judgment. That may be done only by the U.S. Supreme Court on appeal from or writ of certiorari to the state's highest court. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). This principle is now known as the "Rooker-Feldman doctrine." See also, Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970).

C. Plan Approved by State Court Subject to Collateral Attack in Federal Court

Although the state court's judgment on a redistricting plan is not subject to review or direct attack in federal district court, the plan remains subject to collateral attack. That is, it may be attacked in federal court for different reasons or by different parties. See, e.g., Johnson v. DeGrandy, 512 U.S. 997, slip op. at 6-8 (1994); Nerch v. Mitchell, No. 3:CV-92-0095, (M.D. Pa. Aug. 13, 1992) (per curiam).

The judicial doctrines that establish limits on those collateral attacks are called res judicata and collateral estoppel. Res judicata translates literally as "the matter has been decided." It means that a decision by a court of competent jurisdiction on a matter in dispute between two parties is forever binding on those parties and any others who were working with ("in privity with") them. Res judicata applies when the parties are the same, the cause of action is the same, and the factual issues are the same. If the

parties and the issues are the same, but the cause of action is different, the term "collateral estoppel" is used to describe the same concept.

What this means for those who draw redistricting plans is that, if an issue was not raised and decided in state court, it is open for decision in a federal court. It also means that, if parties raise in federal court the same issue raised by different parties in state court, the federal court may come to a different conclusion.

D. Federal Court Must Defer To State Remedies

After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform the plan to federal law. In North Carolina, Cromartie v. Hunt, 34 F. Supp. 1029 (E.D. N.C. 1998), rev'd, Hunt v. Cromartie, 526 U.S. 541 (1999); Georgia, Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd sub nom. Miller v. Johnson, 515 U.S. 900 (1995); and Texas, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996), the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. Only when the Georgia, Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga. 1995) and 922 F. Supp. 1556 (S.D. Ga. 1995), aff'd sub nom. Abrams v. Johnson, 117 S. Ct. 1925 (1997), and Texas, Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997), legislatures had failed to enact a corrected plan did the federal courts in those states impose plans of their own. In contrast, however, the federal district court in Florida imposed a legislative plan of its own within three hours of having struck down the plan enacted by the Legislature and approved by the Florida Supreme Court. The court's order imposing its plan was immediately stayed

by the U.S. Supreme Court, Wetherell v. DeGrandy, 505 U.S. 1232 (1992) (mem.), and eventually reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy. See Johnson v. DeGrandy, 512 U.S. 997 (1994).

If the state's legislative and judicial branches fail to conform a redistricting plan to federal law after having been given a reasonable opportunity to do so, a federal court may impose its own remedy. Even then, however, the federal court must follow discernible state redistricting policy to the fullest extent possible. Upham v. Seamon, 456 U.S. 37 (1982). The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible. Upham v. Seamon, 456 U.S. at 43; White v. Weiser, 412 U.S. 783, 793-97 (1973); Whitcomb v. Chavis, 403 U.S. 124, 160-61 (1971). See also Abrams v. Johnson, 117 S. Ct. 1925 (1997).

E. Attorney General May Represent State in Federal Court

Although the U.S. Supreme Court has been unanimous in holding that a federal court must defer to a state court that is in the process of redistricting, Growe v. Emison, 507 U.S. 25 (1993), in Lawyer v. Department of Justice it split 5-4 on the question of what procedure a federal court should follow when deferring to a state legislature whose redistricting plan has come under attack. 117 S. Ct. 2186 (1997).

Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the ground that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature; the Justice Department had refused to preclear it because it failed to create a majority-minority district in the area; the governor and legislative leaders had refused to call a special session

to revise the plan; the state Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate the Justice Department's objection; and the plan had been used for the 1992 and 1994 elections. A suit had been filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996 the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree.

Justice Stevens, writing for the majority, found that action by the Legislature was not necessary. He found that the State was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation. 117 S. Ct. 2186, slip op. at 8-11.

Justice Scalia, writing for the four dissenters, argued that:

The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.

117 S. Ct. 2186, slip op. at 7.

Now that it is clear that federal courts must defer to redistricting proceedings in a state court, legislatures will want to be prepared to defend their plans in state court. Once the state court proceedings are concluded, and even

while they are in progress, legislatures must be prepared to defend the plans in federal court as well. In both courts, legislatures will want to remain on good terms with their attorney general.

Footnotes

1. **§ 1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973b (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

§ 1973l(c)(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

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District	April 1, 1980	April 1, 1990	April 1, 2000	Percent Change	
				1980 to 1990	1990 to 2000
State	964,691	1,108,229	1,211,537	14.9	9.3
Hawaii County	**92,053**	**120,317**	**148,677**	**30.7**	**23.6**
Puna	11,751	20,781	31,335	76.8	50.8
South Hilo	42,278	44,639	47,386	5.6	6.2
North Hilo	1,679	1,541	1,720	-8.2	11.6
Hamakua	5,128	5,545	6,108	8.1	10.2
North Kohala	3,249	4,291	6,038	32.1	40.7
South Kohala	4,607	9,140	13,131	98.4	43.7
North Kona	13,748	22,284	28,543	62.1	28.1
South Kona	5,914	7,658	8,589	29.5	12.2
Kau	3,699	4,438	5,827	20.0	31.3

Source: U.S. Bureau of the Census, 1990 Census of Population and Housing Unit Counts, Hawaii, 1990 CPH-2-13 (March 1993), table 8; and Census 2000 Redistricting Data, (Pulbic Law 94-171) Summary File; figures compiled and calculated by County of Hawaii, Department of Research & Development.